(28,829)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 874.

ELMORE D. DIER, HARRY J. LAWRENCE, JR., AND LAWRENCE STARR, &c., ET AL., APPELLANTS,

vs.

JOAB H. BANTON, DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, AND MANDRED W. EHRICH, TRUSTEE IN BANKRUPTCY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 15, 1922.

1 *Order Appointing Receiver.*

At a Stated Term of the District Court of the United States for the Southern District of New York Held at the Court House Thereof, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 16th Day of January, 1922.

Present: Hon. Julian W. Mack, Circuit Judge.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and LAWRENCE STARR, Individually and as Co-partners, Doing Business under the Firm Name of E. D. Dier & Co., and E. D. DIER & Co., Alleged Bankrupts.

On reading and filing the annexed petition of Samuel C. Rudman, Ruben Lilienfeld and Charles C. Hansen, duly verified the 14th day of January, 1922, and on all the proceedings heretofore had herein,

Now, upon motion of Hays & Wadhams, attorneys for the petitioners, it is hereby

Ordered that Manfred Ehrick, of New York City, in said district be and he hereby is appointed Receiver of the estate of the said alleged bankrupts on filing a bond as Receiver in the sum of $25,000 with sufficient sureties to be approved by this Court; that thereupon said Receiver take charge of and hold such estate until further

2 notice; and it is further

Ordered that all persons, firms or corporations and all creditors of said alleged bankrupts, and all attorneys, agents, officers and servants of said alleged bankrupts, forthwith deliver to said Receiver all property, assays, and effects of whatsoever nature, and wheresoever located, including merchandise accounts, notes, bills receivable, drafts, checks and moneys and other choses in action, account books, records, chattels, lands and buildings in the possession of or owned by said alleged bankrupts; that said alleged bankrupts are ordered forthwith to deliver to said Receiver all and any of such property now in the possession of said alleged bankrupt; and it is further

Ordered that all persons, firms or corporation, including all creditors of said alleged bankrupt, and the representatives, agents, attorneys, servants of such creditors, and all Sheriffs, Marshals, or other officers, or their deputies, representatives or servants, be and they hereby are jointly and severally enjoined, restrained and stayed from removing, transferring, disposing of or attempting in any way to remove, transfer or dispose of or in any way interfere with the property of said alleged bankrupts or owned or controlled by said alleged bankrupts and in the possession of any officer, agent, attorney or representative of said alleged bankrupts, and all such persons are further enjoined, stayed and restrained from executing or issuing, or causing the execution or issuance or the suing out from any Court

of any process, summons, attachment, replevin, execution
3 or other proceeding for the purpose of impounding or taking possession of or interfering with any property owned by or in possession of said alleged bankrupts, and each and all of said persons, firms or corporations having process against the said alleged bankrupts are hereby severally enjoined from taking any steps or proceedings or doing any act or thing in any action where said alleged bankrupts may be either plaintiff or defendant, and from causing, procuring, suffering or permitting it to be done.

(Signed) JULIAN W. MACK,
U. S. Circuit Judge.

U. S. District Court S. D. of N. Y. Filed Jan. 16, 1922.

Bond of National Surety Company in the sum of $25,000 approved by Julian W. Mack, Circuit Judge, filed Jan. 16, 1922.

4 *Order to Show Cause.*

At a Term of the District Court of the United States for the Southern District of New York Held at the Court House Thereof, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 16th Day of February, 1922.

Present: Hon. Learned Hand, District Judge.

31368.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and LAWRENCE STARR, Individually and as Co-partners, Doing Business under the Firm Name of E. D. Dier & Co., and E. D. DIER & Co., Alleged Bankrupts.

Upon the petition of Elmore D. Dier, verified the 16th day of February, 1922, and upon the petition in bankruptcy and the subpœna herein, and upon all the papers and proceedings in this matter,—

Now, upon motion of Rockwood & Lark, Solicitors for the said Elmore D. Dier and E. D. Dier & Co., it is

Ordered that Hon. Joab B. Banton, District Attorney for New York County, and Manfred W. Ehrich, as the Receiver of the goods, chattels, properties and effects of Elmore D. Dier and E. D. Dier & Co., show cause before the United States District Court for the Southern District of New York, in Room 235, Post Office
5 Building in said City, at the opening of the court at ten o'clock A. M., on Monday, February 20th, 1922, or as soon thereafter as counsel can be heard, why an order should not be made enjoining and restraining the said Receiver from turning over to the said Joab W. Banton, District Attorney of the County of New York, the books, records, documents and papers of Elmore D. Dier and E. D. Dier & Co., upon the ground that said delivery of such papers to the

said District Attorney will be violative of the constitutional protection accorded said alleged bankrupts, as prayed for in the petition of the said Elmore D. Dier and why the said Elmore D. Dier and E. D. Dier & Co., should not have such other and further relief in the premises as may be just, and sufficient reason appearing therefor, it is further

Ordered that until the argument and determination of said motion, said Receiver be and he is hereby directed to retain in his possession the books, records, documents and papers of the said Elmore D. Dier and E. D. Dier & Co., and not to part therewith until the further order and direction of the Court in the premises.

And sufficient reason appearing for prescribing an order to show cause herein, it is further

Ordered that service of a copy of this order and petition upon which it is granted upon said District Attorney and said Receiver on or before the 17th day of February, 1922, shall be due and sufficient service.

LEARNED HAND.

6 *Petition.*

District Court of the United States for the Southern District of New York.

No. 31368.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and LAWRENCE STARR, Individually and as Co-partners, Doing Business under the Firm Name of E. D. Dier & Co., and E. D. DIER & Co., Alleged Bankrupts.

The petition of Elmore D. Dier respectfully shows:

That heretofore and on the 14th day of January, 1922, a petition in involuntary bankruptcy was filed against your petitioner in the proceeding above-entitled, seeking an adjudication in bankruptcy of your petitioner, both individually and as a member of the firm of E. D. Dier & Co.; that the subpœna in said proceeding has been served upon your petitioner, but no answer has yet been filed and said matter is now pending undetermined in the United States District Court for the Southern District of New York; that subsequent to the filing of the said petition, Manfred W. Ehrich, Esq., of 60 Wall Street, New York, was duly appointed receiver of the assets, properties and effects of your petitioner, and of the firm of E. D. Dier & Co., and said Receiver has taken possession of said

7 properties, and among other things has possession of the books, records, documents and papers of said firm of E. D. Dier & Co.

Said firm of E. D. Dier & Co. was engaged in the brokerage business at No. 42 New Street, Borough of Manhattan, City of New York, and has numerous branch offices in several cities throughout the United States. Ancillary Receivers have been appointed in Chicago,

Philadelphia and Pittsburgh, who, upon information and belief, have also taken possession of certain assets and properties of the alleged bankrupt estate.

Your petitioner has been informed by the said Receiver, above named, that the District Attorney of the County of New York, has applied to the said Receiver requesting him to deliver possession to said District Attorney of the said books, records and papers of your petitioner and said firm of E. D. Dier & Co., to the end that the same may be used by the said District Attorney before the Grand Jury of the County of New York in criminal proceedings, wherein the said District Attorney seeks the indictment of your petitioner as having committed an alleged criminal offense.

Your petitioner is advised and verily believes that the delivery of said books, records and papers to the said District Attorney by the said Receiver would be in plain violation of the protection accorded to your petitioner and to the said firm of E. D. Dier & Co., by the Fourth and Fifth amendments to the Constitution of the United States, as they have been interpreted and applied
8 by the Supreme Court of the United States in
Boyd v. U. S., 116 U. S. 616;
Weeks v. U. S., 232 U. S. 383;
Silverthorne Lumber Co. v. U. S., 251 U. S. 385;
Amos v. U. S., 255 U. S. 313;
(See temporary Advance Sheets issued April 20th, 1921.)

Also

Flagg v. U. S., 233 Fed. 481,

and also indirectly in the decision of the United States Supreme Court in Arnstein v. McCarthy, 254 U. S. 71, in that if said books, records and papers are to be used and considered by said Grand Jury as evidence against your petitioner it, in effect, constitutes your petitioner as a witness against himself, which is violative of the constitutional privileges and immunities accorded to your petitioner, as above set forth.

Your petitioner is advised by said Receiver, and verily believes that said Grand Jury is now in session and that the said District Attorney has asked that said books be immediately delivered to him by said Receiver for use before said Grand Jury, as aforesaid, for which reason an order to show cause is desired directing the said Receiver to show cause before this Honorable Court why he should not be enjoined and restrained from delivering over said books, records and papers of your petitioner and the said firm of E. D. Dier & Co., to said District Attorney and said Grand Jury, and why any subpœna issued to the said Receiver or his representatives, should not be vacated.

No previous or other application has been made for the
9 order asked herein, and because of the urgency of the situation, as above set forth, there is no time to give a notice of motion.

Wherefore your petitioner prays for the order to show cause, as aforesaid.

Dated, February 16th, 1922. ELMORE D. DIER.

10 CITY AND COUNTY OF NEW YORK, *ss:*

Elmore D. Dier, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof and that the same is true of his own knowledge except as to the allegations therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. ELMORE D. DIER.

Sworn and subscribed to before me this 16th day of February, 1922.

CHARLOTTE EPSTEIN,
Notary Public New York County.

(Affidavits of service attached.)

U. S. District Court, S. D. of N. Y. Filed Feb. 27, 1922.

11 United States District Court, Southern District of New York.

No. 31368.

In the Matter of E. D. DIER & Co., Ex Parte ELMORE D. DIER.

Opinion of Hon. Learned Hand, District Judge, on Dismissal of Rule.

This proceeding comes up on rule nisi to enjoin a receiver in bankruptcy and the District Attorney of New York County from using the books and papers of the alleged bankrupt firm before the Grand Jury of the Supreme Court of New York. A petition was filed against the firm of which the petitioner was a member, and a receiver appointed. The alleged bankrupts without objection surrendered possession of the books to the receiver, who now holds them. The District Attorney of New York County, contemplating criminal prosecution of the petitioner, has demanded possession of the books for presentation to a Grand Jury. The petitioner asserts that such surrender would violate his constitutional privileges under Articles 4 and 5 of the U. S. Constitution.

Nash Rockwood, for the rule.
Joab W. Banton, District Attorney, opposed.

LEARNED HAND, *D. J.:*

12 It may be accepted that Judge Holt's ruling in In re Harris, 164 Fed. Rep. 293, had the approval of the Supreme Court in the appeal in that case, In re Harris, 221 U. S. 274.

There the alleged bankrupt resisted the surrender of his books to the receiver and was eventually protected to the extent that though he must surrender, it was on condition that the books should not be used by the receiver in aid of any criminal prosecution against him. Thus a compromise was effected between the right of his creditors to administer his assets, and his own right not to produce evidence against himself.

In Johnson v. U. S., 228 U. S. 457, the bankrupt had without reservation surrendered his books to a trustee and these were thereafter used against him in a criminal trial over his objection. The point involving his constitutional privilege went to the Supreme Court and was ruled against him. The theory of the case was that once possession and title passed protest from the bankrupt his privilege ended. "A party is privileged from producing the evidence, but not from its production:" (p. 458). In the case at bar there is indeed no trustee, only a receiver, and a receiver has no title, but that, I conceive, makes no difference. The production depends as little upon compelling the incriminated person to produce evidence against himself, when the possessor has no title as when he has. The possessor alone can produce, not the owner, and the privilege protects only against such compulsion. See also In re Tracy, 177 Fed. Rep. 532, and In re Mandel, 224 Fed. Rep. 642. The test I take is whether the surrender was resisted when the receiver demanded possession.

13 Cases like Boyd v. U. S., 116 U. S. 616, Weeks v. U. S., 232 U. S. 383, and Silverthorne Lumber Co. v. U. S., 251 U. S. 385, are not in point. In each the possessor of the evidence was forced to produce by illegal means, and this was held to taint, as it were, the evidence, so that not even information might be used, which was derived, during the unlawful possession. Gouled v. U. S., 255 U. S. 298, extended the rule to evidence procured by fraud. None of them touches the competency of proof which has been surrendered without claim of privilege made at the time when the privilege could have been effectively asserted.

Nor is Arndstein v. McCarthy, 254 U. S. 71, nearer. That case decided that the declarations contained in schedules did not open the door to examination generally of the bankrupt's assets. It would apply only in case the alleged bankrupts here were examined upon the transactions contained in the books and papers. No one suggested that the schedules themselves were privileged in favor of the bankrupts. Had that been the ruling, as for example it was before the repeal of R. S. Sec. 860, Johnson v. United States, 163 Fed. Rep. 30, something might be said in the case at bar for the privilege, not under the Constitution, it is true, but under the statute. Nothing of the sort now stands in the way, certainly not Arndstein v. McCarthy, supra.

Rule discharged.

L. H., *D. J.*

February 27, 1922.
U. S. District Court, S. D. of N. Y. Filed Feb. 27, 1922.

14 *Order Approving Trustee's Bond.*

At a Court of Bankruptcy Held in and for the Southern District of New York, in the City, County, and State of New York, on the 20th Day of March, 1922.

Before Seaman Miller, Referee in Bankruptcy in the District Court of the United States for the Southern District of New York.

In Bankrupcy.

No. 31368.

In the Matter of ELMORE D. DIER, LAWRENCE STARR, and HARRY J. LAWRENCE, JR., Copartners, Doing Business under the Firm Name and Style of E. D. Dier & Company, Bankrupt.

It appearing to the court that Manfred W. Ehrich, of the City, County and State of New York, and said District, has been appointed trustee of the estate of the above-named bankrupt, and has given bond with sureties for the faithful performance of his official duties in the amount fixed by the creditors, to-wit, the sum of One Hundred Thousand Dollars.

It is ordered that the said bond be and the same is hereby approved.

SEAMAN MILLER,
Referee in Bankruptcy.

15 *Affidavit of Nash Rockwood.*

District Court of the United States for the Southern District of New York.

No. 31368.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and LAWRENCE STARR, Individually and as Co-partners, Doing Business under the Firm Name of E. D. Dier & Co., and E. D. DIER & Co., Alleged Bankrupts.

STATE OF NEW YORK,
City and County of New York, ss:

Nash Rockwood, being duly sworn says that he is of counsel for E. D. Dier and E. D. Dier & Co., above-named; that Manfred W. Ehrich, who was Receiver herein when this proceeding was initiated, has since that time been elected trustee of the bankrupts at a meeting of the creditors, and has qualified as such trustee, and is now acting as such.

NASH ROCKWOOD.

Subscribed and sworn to before me this 10th day of April, 1922.
LEARNED HAND,
U. S. District Judge, Southern District of New York.

16 *Order.*

District Court of the United States for the Southern District of New York.

No. 31368.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and LAWRENCE STARR, Individually and as Co-partners, Doing Business under the Firm Name of E. D. Dier & Co., and E. D. DIER & Co., Alleged Bankrupts.

Upon the affidavit of Nash Rockwood, verified April 10th, 1922, and it appearing that Manfred W. Ehrich, heretofore appointed Receiver of the alleged bankrupts when this proceeding was initiated has since that time been elected trustee of said parties who have been adjudicated bankrupts, and that the said Manfred W. Ehrich has qualified as such trustee and is now acting as such, and,

On motion of Nash Rockwood, Attorney for E. D. Dier and E. D. Dier & Co., it is

Ordered that Manfred W. Ehrich, as Trustee of Elmore D. Dier, Harry J. Lawrence, Jr., and Lawrence Starr, individually and as co-partners doing business under the firm name of E. D. Dier & Co., and E. D. Dier & Co., be, and he is hereby, substituted as a party herein in the place of Manfred W. Ehrich, Receiver, &c., of said alleged bankrupts, and that the papers and proceedings herein be amended accordingly.

LEARNED HAND, *D. J.*

Dated, April 10th, 1922.

U. S. District Court, S. D. of N. Y. Filed Apr. 12, 1922.

17 District Court of the United States for the Southern District of New York.

No. 31368.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and LAWRENCE STARR, Individually and as Co-partners, Doing Business under the Firm Name of E. D. Dier & Co., and E. D. DIER & Co., Alleged Bankrupts.

Order Discharging Rule.

The alleged bankrupts above-named having presented a petition to the Court for an order to show cause requiring the District Attorney of the County of New York and Manfred W. Ehrich, Receiver of the

alleged Bankrupts above-named, to show cause why the Receiver should not be restrained from delivering the books, records and documents of said alleged bankrupts to the District Attorney of the County of New York to be used in a criminal proceeding pending against the said alleged bankrupts in New York County, upon the ground that the use of said books, records and documents would violate the Constitutional privileges of said alleged bankrupts under Articles IV and V of the United States Constitution.

Now, upon the petition in involuntary bankruptcy filed herein on the 14th day of January, 1922, and upon the order appointing Manfred W. Ehrich Receiver of the said alleged bankrupts dated the 16th day of January, 1922, and upon the petition of Elmore D. Dier, verified the 16th day of February, 1922, and upon the subpœna issued by said District Attorney of New York County calling for the production of said books and papers before the Grand Jury of New York County, and upon the order to show cause granted herein on the 16th day of February, 1922, and upon all the
18 papers and proceedings herein and in this involuntary bankruptcy proceeding, including said subpœna issued by said District Attorney, and having heard Nash Rockwood, Esq., of Counsel for said alleged bankrupts in support of said motion, and Hon. Joab H. Banton, District Attorney for the County of New York, represented by Robert S. Johnstone, Esq., in opposition to said motion, and due deliveration having been had,

It is ordered that the injunctive and other relief prayed for in said petition and in said order to show cause, be and the same is hereby denied and the application of said Petitioners denied, and the rule discharged and

Further ordered that the Receiver herein and said alleged bankrupts deliver over said books, records and documents of said E. D. Dier and E. D. Dier and Company to the District Attorney of the county of New York for use in said criminal proceeding against said Petitioners, if and when appropriate process for that purpose is duly served.

LEARNED HAND, *D. J.*

No objection to form.
(Sgd.) JOAB H. BANTON,
District Attorney.

R. S. J.

Filed in the U. S. District Court, S. D. of N. Y., Apr. 12, 1922.

19 District Court of the United States for the Southern District of New York.

No. 31368.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and Lawrence Starr, Individually and as Co-partners, Doing Business under the Firm Name of E. D. Dier & Co., and E. D. Dier & Co., Alleged Bankrupts.

Assignment of Errors.

Now come the alleged bankrupts in the above-entitled matter and file and submit the following assignment of errors, upon which they will rely upon their prosecution of the appeal in the above-entitled matter from the order made herein by this honorable Court, to-wit:

First. The United States District Court for the Southern District of New York erred in refusing to grant the relief prayed for in said petition and in the order to show cause granted thereupon.

Second. The United States District Court for the Southern District of New York erred in denying the application of said alleged bankrupts.

Third. The United States District Court for the Southern District of New York erred in discharging the rule herein.

Fourth. The United States District Court for the Southern District of New York erred in directing the Receiver of said alleged bankrupts and said alleged bankrupts to deliver over the books, records and documents of said E. D. Dier and E. D. Dier & Co., to the District Attorney of the County of New York for use in criminal proceedings against said alleged bankrupts.

20 Fifth. The United States District Court for the Southern District of New York erred in deciding that the delivery of the books, records and documents of said alleged bankrupts to the District Attorney of the County of New York for use in criminal proceeding pending against the said alleged bankrupts in New York County would not violate the constitutional privileges of said alleged bankrupts under Articles IV and V of the United States Constitution.

Sixth. The United States District Court for the Southern District of New York erred in deciding that the alleged bankrupts in any way waived their constitutional privileges under Articles IV and V of the United States Constitution.

Seventh. The United States District Court for the Southern District of New York erred in deciding that the acquirement of possession of the books, records and documents of said alleged bank-

rupts by the Receiver appointed by the Court and under the order of the Court could, in any way be considered or construed, as a waiver by the alleged bankrupts of their constitutional privileges under Articles IV and V of the United States Constitution.

Eighth. The United States District Court for the Southern District of New York erred in not making an order in favor of the said alleged bankrupts, as prayed for in and by their said petition and order to show cause, granted herein, instead of denying their said application and discharging the rule as it did.

Wherefore the Appellants pray that said order be reversed and that the said United States District Court for the Southern District of New York be ordered to enter an order or decree reversing the decision and order of said court in said matter, and to enter
21 an order or decree in accordance with the prayer of the petition of the said alleged bankrupts herein, and in accordance with the relief desired in the order to show cause, hereinbefore granted herein.

E. D. DIER.
E. D. DIER & CO.

ROCKWOOD & LARK,
Solicitors for and of Counsel for said Alleged Bankrupts and Appellants Herein.

Office and Post Office Address, 527 Fifth Avenue, Borough of Manhattan, City, County and State of New York.

Admission of service attached.

Filed in the U. S. District Court for the Southern District of New York April 12th, 1922.

22 District Court of the United States for the Southern District of New York.

No. 31368.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and Lawrence Starr, Individually and as Co-partners, Doing Business under the Firm Name of E. D. Dier & Co., and E. D. Dier & Co., Alleged Bankrupts.

Petition for Appeal.

To the Honorable Learned Hand,
District Court Judge:

The above named Elmore D. Dier, Harry J. Lawrence, Jr., and Lawrence Starr, individually and as co-partners doing business under

the firm name of E. D. Dier & Co., and E. D. Dier & Co., alleged bankrupts in the above-stated matter, feeling aggrieved by the order made and entered in the above-entitled matter on the — day of April, One thousand, nine hundred and twenty-two, do hereby appeal from the said order and from every part thereof, to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed and that citation be issued, as provided by law, and that a transcript of the record, proceedings and documents upon which said order was based, duly authenticated, be sent to the Supreme Court of the United States, under the rules of said court in such cases made and provided.

23 And your petitioners pray that the proper order allowing said appeal and providing for security from them, be made.

ELMORE D. DIER.
E. D. DIER & CO.

ROCKWOOD & LARK,
Solicitors for said Petitioners.

Office & Post Office Address, 527 Fifth Avenue, Borough of Manhattan, City, County and State of New York.

24 CITY AND COUNTY OF NEW YORK, *ss:*

Elmore D. Dier, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof and that the same is true of his own knowledge, except as to the allegations therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

ELMORE D. DIER.

Sworn and subscribed to before me this 10th day of April, 1922.
CLARENCE E. SMITH,
Notary Public, Kings County, N. Y.

Clerk's No. 593. Register's No. 3247.
Certificate filed in New York County. Clerk's No. 591. Reg. No. 3513.
Term Expires March 30, 1923.

Admission of service attached.

Filed, U. S. District Court, Southern District of N. Y., Apr. 12, 1922.

25 District Court of the United States for the Southern District of New York.

No. 31368.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and LAWRENCE STARR, Individually and as Co-partners, Doing Business under the Firm Name of E. D. Dier & Co., and E. D. DIER & Co., Alleged Bankrupts.

Order Allowing Appeal.

On motion of Nash Rockwood, Solicitor and of counsel for the Appellants in the above-stated cause, it is hereby

Ordered that an appeal to the Supreme Court of the United States from the order heretofore filed and entered herein be and the same is hereby allowed, and that a certified transcript of the record, papers, documents and all proceedings herein be forthwith transmitted to said Supreme Court of the United States; and it is

Further ordered that the bond on appeal be fixed at the sum of Two Hundred and Fifty Dollars ($250) as a bond for costs; and it is

Further ordered that for a period of thirty days from date and the further order of this Court in the premises, that all proceedings under the order herein, dated April 10th, 1922, except the appeal therefrom, be stayed, and that Manfred W. Ehrich, Trustee of said bankrupts be and is hereby directed to retain possession of the books, records, documents and papers of the said bankrupts until the further order of this Court.

Dated, April 10th, 1922.

LEARNED HAND, *D. J.*

Filed U. S. District Court, S. D. of N. Y., April 12th, 1922.

26 (*Bond.*)

Bond of the National Surety Company in the sum of $250 filed April 12, 1922, approved by Learned Hand, United States District Judge.

27 United States District Court, Southern District of New York.

31368.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and LAWRENCE STARR, Individually and as Co-partners, Doing Business under the Firm Name of E. D. Dier & Co., and E. D. DIER & Co., Alleged Bankrupts.

Order Extending Time to File Record on Appeal.

It is hereby ordered that the time to file the Transcript of Record on Appeal in the above entitled case be extended one day from this date.

New York, April 12, 1922.

LEARNED HAND,
U. S. District Judge.

28 UNITED STATES OF AMERICA,
Southern District of New York, ss:

31368.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., * * * E. D. DIER & Co., Alleged Bankrupts.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this twelfth day of April, in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty-sixth.

[Seal of District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.

29 District Court of the United States for the Southern District of New York.

No. 31368.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and LAWRENCE STARR, Individually and as Co-partners, Doing Business under the Firm Name of E. D. Dier & Co., and E. D. DIER & Co., Alleged Bankrupts.

Citation for Appearance.

By the Honorable Learned Hand, Judge of the United States District Court for the Southern District of New York, to Honorable Joab H. Banton, District Attorney of the County of New York; to Manfred W. Ehrich, Trustee in Bankruptcy:

Whereas, Elmore D. Dier, Harry J. Lawrence, Jr., and Lawrence Starr, individually and as co-partners doing business under the firm name of E. D. Dier & Co., and E. D. Dier & Co., above-named, have lately appealed to the United States Supreme Court from an order made and entered herein in the District Court of the United States for the Southern District of New York, which order was made in favor of you, the said Hon. Joab H. Banton, District Attorney for the County of New York, and said alleged bankrupts have filed the security required by law,

You are hereby cited to appear before the said United States Supreme Court, to be held at the City of Washington, in the
30 District of Columbia, on the 12th day of April, next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand, at the City of New York, in the Southern District of New York, in the Second Circuit, the 10th day of April in the year of our Lord, one thousand nine hundred and twenty-two.

LEARNED HAND, *D. J.*

Service of a copy of the within citation acknowledged this 11 day of April, 1922.

JOAB H. BANTON,
Per D. ROONEY, *Dist Atty.*,
MANFRED W. EHRICH,
Trustee in Bktcy.,
By L. C. BUNZL.

31 [Endorsed:] U. S. District Court, S. D. of N. Y. Filed Apr. 12, 1922.

32 [Endorsed:] U. S. District Court, Southern District of N. Y. In the Matter of Elmore D. Dier, Harry J. Lawrence, Jr., et al., Alleged Bankrupts. Transcript of Record on Appeal.

Endorsed on cover: File No. 28,829. S. New York D. C. U. S. Term No. 874. Elmore D. Dier, Harry J. Lawrence, Jr., and Lawrence Starr, &c., et al., appellants, vs. Joab H. Banton, District Attorney of the County of New York, and Manfred W. Ehrich, trustee in bankruptcy. Filed April 13th, 1922. File No. 28,829.

Supreme Court of the United States.

OCTOBER TERM, 1922.

IN THE MATTER
of
ELMORE D. DIER, HARRY J. LAWRENCE, JR., LAWRENCE STARR, individually and as co-partners doing business under the firm name of E. D. DIER & Co., and E. D. DIER & Co., Alleged Bankrupts,
Appellants.

2

Affidavit and Memorandum joining in application to advance cause for argument, but opposing stay.

3

STATE OF NEW YORK, }
County of New York, } ss.:

JOHN CALDWELL MYERS, being duly sworn, deposes and says that he resides at No. 67 West 11th Street, in the Borough of Manhattan, City, County and State of New York; that he is an attorney and counsellor at law, duly admitted to practice in this Court and in the courts of the State of New York; and that he is an assistant district attorney in the office of the District At-

4 torney of New York County and is attached to the Appeal Bureau in that office and has charge of these proceedings for and on behalf of the said District Attorney.

An appeal has been taken to this court from an order entered in the District Court of the United States for the Southern District of New York denying the application of the alleged bankrupts herein for an injunction restraining the receiver of the alleged bankrupts from delivering the books, records and documents of the said alleged bankrupts to the District Attorney of the County of New York.

5 On May 11th, 1922, the appellant served on the District Attorney of New York County notice that application would be made to this Court on Monday, May 15th, 1922, "for an order of the Court advancing said cause upon the calendar of the Court for argument at the present session of the Court, and for such other and further relief as may be just". There was served with the said notice an affidavit made by Nash Rockwood on May 11th, 1922, in support of the said application.

6 The District Attorney of New York County joins in the application to advance the cause for argument in this court, and respectfully requests the Court to grant the said application. But the said District Attorney respectfully opposes any application that may be made for an order staying or restraining him from serving a *subpoena duces tecum* requiring the production of the books, records and papers of E. D. Dier and E. D. Dier & Co. The District Attorney's reasons for opposing a further stay will be found in the following recital of the history of the proceedings to obtain injunctive relief:

On or about February 16th, 1922, Elmore D. 7
Dier, one of the alleged bankrupts herein, obtained from Hon. Learned Hand, one of the Judges of the District Court of the United States for the Southern District of New York, an order to show cause why an order should not be made enjoining and restraining the receiver of the alleged bankrupts herein from turning over to the District Attorney of the County of New York, the books, records, documents and papers of Elmore D. Dier and E. D. Dier & Co. The said order to show cause was made returnable on February 20th, 1922, and contained a clause providing that until the argument and determination of the said mo- 8
tion, the receiver was directed to retain in his possession the said books, records, documents and papers and not to part therewith until the further direction and order of the court in the premises.

On the return day of the said order to show cause, the District Attorney of New York County appeared before Judge Learned Hand and opposed the granting of the relief prayed for.

Thereafter, and on or about February 27th, 1922, Judge Learned Hand handed down an opinion refusing to grant the application for injunctive 9
relief.

After the said opinion was handed down, the said District Attorney, through one or more of his assistants, communicated several times with Nash Rockwood, Esq., of Rockwood & Lark, solicitors for the alleged bankrupts, for the purpose of agreeing upon the form and contents of an order denying the injunction which had been sought. The submission of the order to Judge Hand for signature was delayed from time to time at the

10 request of Mr. Rockwood, and none of the delay was at the request or desire of the District Attorney.

Finally, and on or about April 10th, 1922, the said order was submitted to and signed by Judge Learned Hand; and on the same day, towit, April 10th, 1922, the said judge signed an order allowing an appeal to this court from the order denying the injunction. The order allowing the appeal stayed all proceedings under the order denying the injunction for a period of thirty days, expiring May 10th, 1922. The purpose of the said stay was to give the appellants an opportunity to
11 print and file a record on appeal in this court and to make an application in this court to advance the appeal for argument.

On or about May 8th, 1922, Judge Learned Hand signed an order requiring the District Attorney to show cause on May 11th, 1922, why an order should not be made continuing the stay for a further period of thirty days. This order to show cause contained a provision that until the argument and determination of the motion, the stay theretofore granted should be continued. The order to show cause was granted on the affidavit
12 of Nash Rockwood, Esq. That affidavit contained the following allegations:

> "The appeal to the Supreme Court of the United States was promptly perfected and all of the papers relative thereto duly certified and filed with the Clerk of the Supreme Court of the United States. The bond upon appeal, $250, was duly given and said appeal was fully perfected on the 12th day of April, 1922. The deposit required by the Clerk of the said Supreme Court of the United States for the printing of the record on appeal was

duly made, and I am advised by said clerk that said record will be printed as promptly as possible, and copies furnished for use of the Court and counsel." 13

On May 10th, 1922, deponent called up the office of the Clerk of the Supreme Court of the United States over the long-distance telephone, and was informed that the deposit referred to in the affidavit of Mr. Rockwood was made on April 29th, 1922. It thus appears that the deposit was not made until 19 days after Judge Learned Hand had signed the order allowing the appeal to this court.

On May 11th, 1922, which was the return day named in the order to show cause obtained on May 8th, 1922, this deponent, acting for and in behalf of the District Attorney of New York County, appeared before Judge Learned Hand and opposed the application for the continuance of the stay. Judge Hand, after hearing argument, extended the stay up to and including May 16th, 1922, in order to give the appellants an opportunity to apply to this Court on May 15th, 1922, for the advancement of the cause for argument, and for a further stay. 14

Deponent respectfully submits that the appellants have not used due diligence in taking the necessary and proper steps for perfecting their appeal to this court and for bringing the same on for argument, and that, therefore, no further stay should be granted, but that the District Attorney of New York County should be left free to serve any proper process duly issuing out of the Courts of the State of New York requiring the production of the books, records, documents and papers of the alleged bankrupts herein, and that the receiver of the said alleged bankrupts 15

16 should be left free to obey the commands contained in such process if and when service is duly made upon him.

Deponent is informed and verily believes that the appellants, prior to the institution of the bankruptcy proceedings, were engaged in conducting what purported to be a stock brokerage business, but that in conducting the said alleged business, which was of large proportions, they did many things with and to the money and securities of their customers that were prohibited by the criminal laws of the State of New York.

Many complaints have been made to the Dis-
17 trict Attorney of New York County concerning transactions with the alleged bankrupts herein, but the District Attorney cannot properly investigate these complaints and cannot ascertain and determine whether there have been violations of the law unless and until he examines the books, records, documents and papers of the said alleged bankrupts.

Almost three months have elapsed since the institution of these proceedings. Ever since February 16th 1922, the District Attorney of New York County has been restrained by the process of the
18 District Court of the United States for the Southern District of New York from serving a *subpoena duces tecum* to compel the production of the books, records, papers and documents of the alleged bankrupts herein; and the District Attorney has thus been hampered, hindered and delayed in his efforts to ascertain whether any crime has been committed by the alleged bankrupts or any of them during the course of the business carried on by them.

Deponent respectfully submits that there is no merit in the claim of the said alleged bankrupts that they are entitled to the injunction sought and respectfully submits that the said bankrupts have pursued such dilatory tactics that they are not entitled to ask this court to grant a stay pending the hearing and determination of the appeal from the order of the District Court denying the injunction. 19

JOHN CALDWELL MYERS.

Sworn to before me this
12th day of May, 1922.
JOHN J. BUCKLEY,
Notary Public, New York County
New York County Clerk's No. 354
New York County Register's No. 4094
Commission expires March 30, 1924
[SEAL] 20

21

FILED
MAY 16 1922
WM. R. STANSBURY
CLERK

Supreme Court of the United States,

OCTOBER TERM 1921,

No. 330

In the Matter

of

Elmore D. Dier, Harry J. Lawrence, Jr. and Lawrence Starr, individually and as copartners doing business under the firm name of E. D. Dier & Co. and E. D. Dier & Co.
Bankrupts,
Appellants.

Affidavit of Saul S. Myers.

Joab H. Banton, District Attorney of New York County, and Manfred W. Ehrich, Trustee in Bankruptcy of E. D. Dier & Co.,
Appellees.

State of New York,
City and County of New York, } ss.:

Saul S. Myers, being duly sworn, deposes and says:

1. I am one of the attorneys of Manfred W. Ehrich, Esq., Trustee in Bankruptcy herein. Arthur Garfield Hays is the other attorney of the Trustee in Bankruptcy. Mr. Hays and I represent about two thousand (2,000) creditors of the estate in bankruptcy.

2. On behalf of that large body of creditors Mr. Hays and I co sent to the submission to this Court of briefs on the appeal presente by the bankrupts, *provided such briefs are submitted on or before th 22nd instant but object to any oral argument and strongly object to a stay of proceedings,* for the reason that this Court has announced th it will not hear any further oral agruments before the summer recess and the failure of the appellants to have the matter argued before th summer recess is due entirely to their dilatory tactics.

3. The appellants have allowed this matter to drag since Januar 16, 1922; on that day a petition was filed in the U. S. District Court fo the Southern District of New York for the involuntary bankruptcy o the said Elmore D. Dier et al. The appellants took no steps to prote their supposed constitutional rights until February 16, 1922; on th day they obtained from Judge Learned Hand an order requiring th Receiver in Bankruptcy—the present Trustee—to show cause why a order should not be entered enjoining him from turning over to th District Attorney of the County of New York, on subpoena, the book of the bankrupts. The matter was argued on or about February 2 1922 and was decided on or about February 27, 1922. Judge Learne Hand denied the motion. The Receiver adopted a neutral positio The appellants waited until April 10, 1922 before obtaining from Judg Hand an order denying their motion. They were perfectly content t allow the matter to drag from February 27, 1922 to April 10, 1922. An they have waited from April 10, 1922 to May 15, 1922 before makin the present application to advance.

4. The appellants would not have made the motion even at thi time except that the stay granted by Judge Learned Hand will expir on the 16th instant. I was in Court before Judge Learned Hand on th 11th instant when he announced that he would not grant any furth stay of proceedings in this matter.

5. In my opinion the order is not appealable, and I respectfull submit that this Court will, at the proper time, dismiss the appeal. N constitutional question is involved at all. The bankrupts voluntaril handed over to the Receiver in Bankruptcy the books and papers no sought by subpoena. Some of these records were handed over to m

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ersonally as the Receivers representative; other papers were to my wn knowledge handed over to the Receiver personally by the bankupts and their present attorney Nash Rockwood, Esq. At the time of urning over of such books and papers *no protest of any kind* was made y the bankrupts or their attorneys. And I submit that where bankupts voluntarily turn over their books and papers to a Receiver in Bankruptcy, no provision of the Constitution is violated if those books nd papers are afterwards used in the prosecution of the bankrupts for iolation of criminal statutes.

6. Moreover the principal bankrupt, Elmore D. Dier, has testified t great length in the bankruptcy proceeding, without claiming any onstitutional privilege at all; and he has furthermore testified from is books and records without claiming any constitutional privilege; nd I submit that any claim now made by the bankrupts that their ooks should not be used by the District Attorney, comes too late.

7. I also submit that the bankrupts will not at any rate lose any onstitutional privileges which they now have, for the reason that they an upon the trial of the action present their constitutional claims, and f they are convicted the matter can then be reviewed by this Court.

8. This is a particularly fraudulent failure; the liabilities are in xcess of $3,000,000.; the assets which have thus far come into the possession of the Receiver and Trustee are less than $100,000. The Trustee has, however, through his attorneys, been able to increase the estate o approximately $500,000. by the settlement of claims against third parties.

Mr. Hays and I have examined the bankrupt Dier, and a large number of other witnesses, and from such examinations and from independent investigations we have ascertained that the bankrupts were engaged n what is commonly known as a "bucket shop." During the three months immediately preceding bankruptcy they did not even make any pretense of buying or selling the customers' orders. During that time hey took in tremendously large sums of money from customers; some of these customers being widows and orphans, school teachers, waiters, nd even cripples. Dier testified that he did not know what he did with he $300,000. that he drew out during the twelve months immediately

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preceding bankruptcy. He testified that whenever his partner Hugh bought a diamond necklace or a string of pearls for his wife, Dier wou make a similar purchase of a diamond necklace or a string of pearls f his wife; and all of this money came from the innocent customers. N satisfactory explanation has yet been given by the bankrupts or a one else of the disappearance of nearly $3,000,000.

9. If the Court grants a stay of proceedings it will tie the han not only of the District Attorney of the County of New York, but of th United States Attorney for the Southern District of New York. An not only will the hands of those district attorneys be tied as against th bankrupts, but also against such other persons involved as Fred An drews, Bernie Andrews, Gus Stroh, and such members of the Ne York Stock Exchange as Carpender, Caffry & Co., and of the Consol dated Stock Exchange of New York as Percy Thomas, and of certa members of the New York Curb Market, who participated in these tran actions.

SAUL S. MYERS.

Sworn to before me
May 13, 1922.
JOS. G. GUERIN,
Notary Public,
New York County #501.

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Office Supreme Court, U. S.
FILED
MAY 15 1922
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. [illegible]330

IN THE MATTER OF ELMORE D. DIER, HARRY J. LAWRENCE, JR., LAWRENCE STARR, INDIVIDUALLY AND AS COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF E. D. DIER & CO., AND E. D. DIER & CO., APPELLANTS.

MOTION OF APPELLANTS TO ADVANCE CAUSE FOR ARGUMENT AND FOR THE CONTINUATION OF STAY GRANTED BY JUDGE LEARNED HAND PENDING DECISION.

NASH ROCKWOOD,
Of Counsel for Appellants.

527 5TH AVENUE, NEW YORK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 874.

IN THE MATTER OF ELMORE D. DIER, HARRY J. LAWRENCE, JR., LAWRENCE STARR, INDIVIDUALLY AND AS COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF E. D. DIER & CO., AND E. D. DIER & CO., ALLEGED BANKRUPTS.

MOTION OF APPELLANTS TO ADVANCE CAUSE FOR ARGUMENT AND FOR THE CONTINUATION OF STAY GRANTED BY JUDGE LEARNED HAND PENDING DECISION.

SIRS:

Take notice that upon the affidavit of Nash Rockwood, verified the 11th day of May, 1922, and upon the record upon appeal herein, and upon all the papers and proceedings herein, application will be made to the Supreme Court of the United States, at the court-room, Washington, D. C.,

on Monday, May 15, 1922, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order of the court advancing said cause upon the calendar of the court for argument at the present session of the court, and for such other and further relief as may be just.

Dated, May 11, 1922.

ROCKWOOD & LARK,
Attorneys for Defendants in Error.

527 FIFTH AVENUE, NEW YORK.

To

HON. JOAB H. BANTON,
District Attorney of New York County.
SAUL S. MYERS, ESQ.,
ARTHUR G. HAYS, ESQ.,
Attorneys for Trustees.

IN THE UNITED STATES SUPREME COURT.

OCTOBER TERM, 1921.

No. 874.

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., and LAWRENCE STARR, *Individually and as Copartners, Doing Business under the Firm Name of E. D. Dier & Co.*, and E. D. DIER & Co., *Alleged Bankrupts.*

STATE OF NEW YORK,
County of New York:

Nash Rockwood, being duly sworn, says:

I am a member of the firm of Rockwood & Lark, 527 Fifth Avenue, New York City, who are attorneys for defendants in error in the matter above entitled. This is an appeal by E. D. Dier and E. D. Dier & Co., bankrupts, from an order of the United States District Court, Southern District of New York, refusing their application for an injunction prohibiting the delivery of their records and books of account to the district attorney of the county of New York for use against them in the matter of procuring their indictment from a grand jury for the alleged commission of a criminal offense.

A petition in involuntary bankruptcy was heretofore filed against said E. D. Dier and E. D. Dier & Co., and the United States District Court, Southern District of New York, appointed a receiver *pendente*, and ordered the alleged bankrupts to deliver their books, papers, and records to the receiver. The receiver qualified and took possession of said books, records, and papers by virtue of the order appointing him and without any affirmative act on the part of said alleged bankrupts. Thereafter, while said documentary evidence was in the said possession of said receiver, the district

attorney of New York County served a subpœna upon the receiver requiring him to produce said documentary evidence to be used before a grand jury of New York County in the matter of procuring an indictment against the alleged bankrupts for alleged criminal offense. The alleged bankrupts thereupon petitioned the United States District Court for an order restraining said receiver from so turning over said documentary evidence upon the ground that the said use of the same would, in effect, make said bankrupts witnesses against themselves and would violate their constitutional rights. An order to show cause was granted, with a temporary restraining order, and the court subsequently denied the application for an injunction, stating, as one of the reasons therefor, in substance that when the receiver took possession of the said books, records, and papers of said bankrupts it constituted a legal waiver of their constitutional rights. The bankrupts thereupon filed assignments of error and prayed for leave to appeal to this court, which was granted. Appeal was thereupon perfected, bond given, and necessary cash deposit made with the clerk of this court for printing the record. The court has continued the temporary restraining order pending the determination of said appeal, and said stay will expire by limitation on Tuesday, May 16, 1922. Application is now made to advance the cause for argument in this court for the reason:

1. That an early determination of the questions of law involved is desired by all parties to the record herein—by the defendants in error because Judge Hand has stated to counsel upon oral argument that he will not continue the stay for an indefinite period, and by the district attorney of New York County because he has stated that he needs the

books and papers, if he is entitled to have them, for use in prospective criminal prosecutions.

WHEREFORE defendants in error respectfully request this court to advance this cause for argument at the present session of the court, to the end that there may be an early decision of the important questions involved.

NASH ROCKWOOD.

Subscribed and sworn to before me this 11th day of May, 1922.

CHARLOTTE EPSTEIN,
Notary Public.

N. Y. Co. Cl'k's No. 108. Reg. No. 4116.
Commission expires March 30, 1924.

[Endorsed:] 874—28829. United States Supreme Court. In the Matter of Elmore D. Dier, Harry J. Lawrence, Jr., and Lawrence Starr, *et al.*, alleged bankrupts, defendants in error. Original. Affidavit & notice of motion. Rockwood & Lark, Attorneys for defendants in error, office and post office address, 427 Fifth Avenue, Borough of Manhattan, New York, N. Y.

Due and personal service of affidavit and notice of motion is admitted this 11th day of May, 1922.

ARTHUR GARFIELD HAYS,
Atty. for Trustee.

Copy rec'd May 11, 1922.

JOAB H. BANTON,
Per J. BRESLIN.

Copy rec'd 5/11/22.

SAUL S. MYERS,
Atty. for Trustee.

SUPREME COURT OF THE U. S.

OCTOBER TERM, 1921.

No. 874.

In the Matter of ELMORE D. DIER ET ALS., *Appellants.*

DISTRICT OF COLUMBIA, *ss:*

Nash Rockwood, being duly sworn, says: I have read the affidavit of Assistant District Attorney John Caldwell Myers, verified May 12, 1922, in opposition hereto. There was no unnecessary or unusual delay either in perfecting the appeal herein or in the matter of having the record printed. The appeal was perfected on April 13, 1922, three days after the said appeal was allowed. The deposit of $85 with the clerk of this court for printing the record herein was made promptly. I am informed by said clerk that this court ceased hearing oral arguments after April 28, 1922, so that said cause could not have been orally argued at this term of the court. NASH ROCKWOOD.

Subscribed and sworn to before me this 10th day of May, 1922.

[SEAL.] C. ELMORE CROPLEY,
Notary Public, District of Columbia.

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Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 330 (874).

ELMORE D. DIER, HARRY J. LAWRENCE, JR., and LAWRENCE STARR, &c., *et al.*,
Appellants,

vs.

JOAB H. BANTON, District Attorney of the County of New York, and MANFRED W. EHRICH, Trustee in Bankruptcy,
Appellees.

BRIEF FOR APPELLEE, JOAB H. BANTON, AS DISTRICT ATTORNEY, ETC.

Statement.

This is an appeal from an order entered in the District Court of the United States for the Southern District of New York on April 12th, 1922, discharging a rule to show cause and denying the prayer of a petition for injunctive and other relief.

On January 16th, 1922, an order was entered in the District Court of the United States for the Southern District of New York, appointing the appellee herein, Manfred W. Ehrich, Receiver "In the Matter of Elmore D. Dier, Harry J. Lawrence, Jr., and Lawrence Starr, individually and as copartners doing business under the firm name of E. D. Dier & Co., and E. D. Dier & Co., alleged bankrupts." The proceeding in which such appointment was made was instituted by three creditors. The said order directed the said alleged bankrupts, their attorneys, agents, officers and servants to deliver forthwith to the said receiver all his property and effects in the possession of or owned by the said alleged bankrupts, including account books, records, etc. (Tr., pp. 1-2).

On February 16th, 1922, the said Elmore D. Dier obtained an order from the District Court of the United States for the Southern District of New York, requiring Joab H. Banton, District Attorney for New York County, and Manfred W. Ehrich, as the receiver of the goods, chattels, property and effects of Elmore D. Dier & Co., to show cause before the said court why an order should not be made enjoining and restraining the said receiver from turning over to the said District Attorney the books, records, documents and papers of Elmore D. Dier and E. D. Dier & Co. upon the ground that the delivery of such papers to the said District Attorney would be "violative of the constitutional protection accorded said alleged bankrupts". This order to show cause was based upon a petition verified by Elmore D. Dier on February 16th, 1922, which alleged, among other things, that the petitioner had been informed by the receiver that the District Attorney of New York County had requested the receiver to deliver possession of the books, records and

papers of the petitioner and of the firm of E. D. Dier & Co., to the end that the same might be used by the District Attorney before the Grand Jury of the County of New York in criminal proceedings wherein the District Attorney sought the indictment of the petitioner. The petition also alleged that the delivery of the said books, records and papers to the District Attorney by the receiver would be in plain violation of the protection accorded to the petitioner and to the firm of E. D. Dier & Co. by the Fourth and Fifth Amendments to the Constitution of the United States (Tr., pp. 4-7).

The petition and order to show cause were heard on the return day by Hon. Learned Hand, District Judge, who on February 27th, 1922, rendered a written opinion that the rule be discharged on the ground that the petitioner was not entitled to the relief sought in the petition (Tr., pp. 5, 6).

On April 12th, 1922, an order was entered in the District Court of the United States for the Southern District of New York, discharging the rule and denying the injunctive and other relief prayed for in the petition, and directing the receiver and the alleged bankrupts to "deliver over said books, records and documents of said E. D. Dier and E. D. Dier & Co. to the District Attorney of the County of New York for use in said criminal proceedings against said petitioners if and when appropriate process for that purpose is duly served" (Tr., pp. 8, 9).

On April 12th, 1922, orders were entered in the District Court of the United States for the Southern District of New York substituting Manfred W. Ehrich, as trustee of the alleged bankrupts, as a party herein in the place of Manfred W. Ehrich, receiver of the alleged bankrupts, and allowing an appeal to this court from the order discharging

the rule and denying the injunctive relief sought in the petition (Tr., pp. 8, 13).

Thereafter, and in the month of May, 1922, this court denied the appellants' motion to advance the cause for argument and for a stay against the receiver and the District Attorney pending the argument.

There is nothing in the petition for an injunction to show that the alleged bankrupts, when they surrendered the possession of the books to the receiver, made any objection to the surrender or made any attempt to preserve any constitutional rights which they may have had against the use of the books in criminal prosecutions instituted against them.

The Assignments of Error.

The appellants have made eight assignments of error (Tr., pp. 10, 11). These assignments raise but one question for determination by this court. That question is as follows:

> Where alleged bankrupts surrender their books, records and documents to the receiver appointed in involuntary bankruptcy proceedings instituted against them, and do this without objection or protest and without making any claim of right or privilege to be protected against the subsequent use of such books, etc., in criminal prosecutions instituted against them, does the delivery of such books, etc., to a state prosecuting officer for use in criminal proceedings against the said alleged bankrupts violate their constitutional privileges under the Fourth and Fifth Amendments to the Constitution of the United States?

POINT I.

If the appellants had any right or privilege against the use of the books, etc., as evidence against them in any criminal prosecution, they waived it by failing to assert it seasonably.

The petition for an injunction filed in the District Court does not allege that the alleged bankrupts interposed any objection or made any assertion of privilege against use in criminal prosecution at or before the time when their books, records and papers were surrendered to the receiver appointed in the bankruptcy proceedings instituted against them, or at any time prior to the making of the petition. This being so, it must be assumed, for the purpose of this appeal, that no such objection or assertion of privilege was made prior to the making of the petition in this proceeding, which was 31 days after the appointment of the receiver in bankruptcy.

We do not concede that if the alleged bankrupts had, at the time of the surrender of the books, records and papers to the receiver in bankruptcy, stipulated that they should not be used as evidence against them in a criminal prosecuion, such sipulation would have availed to prevent the authorities of the State of New York from using the evidence in a criminal prosecution against the bankrupts in the said courts. Indeed, that very question is involved in two appeals which the District Attorney of New York County has taken to this Court from orders enjoining him from compelling the production of the books of certain bankrupts. The appeals in question will come on for argument some time in the near future.

But if we concede, for the sake of the argument in this case, that bankrupts have a constitutional right or privilege against production of their papers after surrender to the receiver, where due and seasonable assertion of the right is made, we respectfully submit that the right, if it exists, is one that may be waived.

In the case at bar, any constitutional right or privilege which the bankrupts may have had in regard to the use of the books, records and papers as evidence against them in a criminal prosecution in the courts of the State of New York was waived by the failure of the bankrupts to assert such right or privilege at the time they parted with the possession of the books, etc.—that is, at the time that possession was surrendered to the receiver in bankruptcy. This is made so clear by the opinion of Judge Hand in the District Court in this case, that we set out his opinion in full and adopt his reasoning and his statement of the law for our argument:

> "It may be accepted that Judge Holt's ruling in *re* Harris, 164 Fed. Rep. 293, had the approval of the Supreme Court in the appeal in that case, in *re* Harris, 221 U. S. 274. There the alleged bankrupt resisted the surrender of his books to the receiver and was eventually protected to the extent that though he must surrender, it was on condition that the books should not be used by the receiver in aid of any criminal prosecution against him. Thus a compromise was effected between the right of his creditors to administer his assets and his own right not to produce evidence against himself.
>
> In Johnson *v.* U. S. 228 U. S. 457, the bankrupt had without reservation surrendered his books to a trustee and these were thereafter used against him in a criminal trial over his objection. The point involving his consti-

tutional privilege went to the Supreme Court and was ruled against him. The theory of the case was that once possession and title passed without protest from the bankrupt his privilege ended.

'A party is privileged from producing the evidence, but not from its production' (p. 458). In the case at bar there is indeed no trustee, only a receiver, and a receiver has no title, but that I conceive makes no difference. The production depends as little upon compelling the incriminated person to produce evidence against himself, when the possessor has no title as when he has. The possessor alone can produce, not the owner, and the privilege protects only against such compulsion. See also in *re* Tracy, 177 Fed. Rep. 532, and in *re* Mandel, 224 Fed. Rep. 642. The test I take is whether the surrender was resisted when the receiver demanded possession.

Cases like Boyd *v.* U. S., 116 U. S. 616, Weeks *v.* U. S. 232 U. S. 383, and Silverthorne Lumber Co. *v.* U. S. 251 385, are not in point. In each the possessor of the evidence was forced to produce by illegal means, and this was held to taint, as it were, the evidence, so that not even information might be used, which was derived during the unlawful possession. Gouled *v.* U. S. 255 U. S. 298 extended the rule to evidence procured by fraud. None of them touches the competency of proof which has been surrendered without claim of privilege made at the time when the privilege could have been effectively asserted.

Nor is Arndstein *v.* McCarthy, 254 U. S. 71, nearer. That case decided that the declarations contained in schedules did not open the door to examination generally of the bankrupt's assets. It would apply only in case the alleged bankrupts here were examined upon the transactions contained in the books and papers. No one suggested that the schedules themselves were privileged in favor of the bankrupts. Had that been the ruling, as for example, it was before the repeal

Supreme Court of the United States.

OCTOBER TERM, 1921.

IN THE MATTER

of

ELMORE D. DIER, HARRY J. LAWRENCE, JR., LAWRENCE STARR, individually and as co-partners doing business under the firm name of E. D. DIER & Co., and E. D. DIER & Co.,
Alleged Bankrupts,
Appellants.

SUPPLEMENTAL MEMORANDUM OPPOSING FURTHER STAY.

The affidavit made by Mr. Rockwood on May 11th, 1922, in support of the motion to advance the cause for argument and for other relief, contains the following allegations [p. 4]:

> "The bankrupts thereupon filed assignments of error and prayed for leave to appeal to this court, which was granted. Appeal was thereupon perfected, bond given, and necessary cash deposit made with the clerk of this court for printing the record."

A subsequent affidavit made by Mr. Rockwood contains the following allegations [p. 6]:

> "I have read the affidavit of Assistant District Attorney John Caldwell Myers, verified May 12, 1922, in opposition thereto. There was no unnecessary or unusual delay either in perfecting the appeal herein or in the matter of having the record printed. The appeal was perfected on April 13, 1922, three days after the said appeal was allowed. The deposit of $85 with the clerk of this court for printing the record was made promptly."

It will be observed that in neither affidavit did Mr. Rockwood give the date when the deposit for printing was made. The records of the Clerk of this Court show that the deposit was made on April 29th, 1922. This was 19 days after the allowance of the appeal. We submit that in view of the fact that the stay granted by the District Court was for 30 days only, a delay of 19 days in making the deposit for printing was wholly inexcusable. It seems to us that the appellants have been guilty of such laches that they are not entitled to ask for a further stay. But wholly apart from the question of laches, there are good and sufficient reasons for denying the application for a further stay. These reasons are, according to our view, that the appellants have absolutely no right to the injunctive relief which they seek, and that the injunction proceedings have been instituted and are being prosecuted solely for dilatory purposes.

In the memorandum for the appellants in support of the pending motion, some significance seems to be attached to the fact that the District Attorney has joined in the motion to advance the cause for argument. The District Attorney has

done this, not because he has any doubt as to the lack of merit in the appellants' application for injunctive relief, but because it is his practice to proceed as speedily as possible in disposing of matters pending in his office.

Undoubtedly, due process of law should be observed in prosecutions for crime. The legal rights of the accused should be scrupulously respected. This is true, no matter how atrocious the crime may be, and no matter how vile or how mean the criminal. The District Attorney of New York County believes in this doctrine and practices it. But, of course, the primary purpose of the law is not to protect the rights of the accused, but to protect society by punishing the criminal. And when a person accused of crime claims a right which, if allowed, will interfere with his prosecution, it is incumbent upon him to show clearly that his claim is well founded.

We have here a very remarkable situation. The appellants, prior to the bankruptcy proceeding, were engaged in conducting a so-called stock brokerage business. They did business on a large scale and had thousands of customers. Their business was conducted in such a way that a large percentage of their customers were defrauded. Many of their victims have suffered severe losses. Such investigation as has been made has developed the existence of a grave scandal. The operation of the business was interrupted by the institution of the bankruptcy proceedings. Upon the appointment of the receiver in the bankruptcy proceedings, the books, records and papers which had been used in carrying on the business passed into the hands and possession of the receiver; and the bankrupts [the appellants herein] did not assert

any constitutional right or privilege in respect to the use which should be made of such books, documents and papers.

Any constitutional right or privilege which the bankrupts may have had in regard to the use of the books, records and papers as evidence against the bankrupts in a criminal prosecution were waived by the failure of the bankrupts to assert such right or privilege at the time they parted with the possession of the books, etc. This point is made very clear in the opinion rendered in this proceeding by the judge of the District Court. A copy of that opinion is hereto annexed, marked "Exhibit A." The District Court's opinion was based upon the opinion of this court in *Johnson* v. *United States* (228 U. S. 457). The *Johnson* case is controlling in the case at bar. The only difference between the two cases is that in the *Johnson* case the books had passed into the hands of the trustee, whereas in this case, they have passed into the hands of the receiver. But there is no distinction whatsoever in principle between the two cases.

We respectfully submit, on the authority of the *Johnson* case, that the order of the District Court, from which the pending appeal has been taken, should be affirmed by this court when it is considered on the merits, and that, therefore, the appellants should not be granted a stay pending the hearing and determination of the appeal.

Numerous complaints have been made which justify the District Attorney in believing that the appellants in this case, or some of them, committed crimes against the laws of the State of New York in the course of the conduct of their so-called brokerage business. It is necessary for the Dis-

trict Attorney of New York County to examine the books, records and papers used in the conduct of the said business before he can determine whether there is sufficient evidence to support criminal prosecutions. The continuance of the stay restraining the receiver from obeying a *subpoena duces tecum* will prevent the District Attorney from performing his duty in the premises. The bankrupts, who are believed to have engaged in unlawful practices, are in court, but not as defendants. They are in this court as complainants, with the District Attorney of New York County as a virtual defendant. There is no merit in their contention, and we feel that they are trifling with the courts and with the District Attorney. We respectfully submit that this condition should not be allowed to continue.

We have endeavored to show that there is no foundation for the appellants' claim that the seizure of the books under the process of the State courts would invade their constitutional rights and privileges. It seems to us that there can be no doubt as to what the law is on this question. But even if the question were not free from doubt, we still feel that there should be no further stay. If an indictment is found and it is based upon evidence which is incompetent because seized in violation of the constitutional rights of the defendant, a motion to dismiss can be made on that ground; and if the motion is denied an exception can be taken which will save the question for review in the appellate courts. Similarly, if incompetent evidence is admitted at the trial, over appropriate objection and exception, and a conviction is had, the reception of the evidence may be reviewed on appeal; and if it is claimed that a right guaranteed

the defendant by the Constitution of the United States has been denied, the judgment of conviction may ultimately be reviewed in this court.

Respectfully submitted,

JOAB H. BANTON,
District Attorney,
New York County.

JOHN CALDWELL MYERS,
Of Counsel.

May 19, 1922.

Exhibit "A"

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER *of* E. DIER & Co., *Ex-parte:* ELMORE D. DIER.	31368.

This proceeding comes up on rule *nisi* to enjoin a receiver in bankruptcy and the District Attorney of New York County from using the books, and papers of the alleged bankrupt firm before the Grand Jury of the Supreme Court of New York. A petition was filed against the firm of which the petitioner was a member, and a receiver appointed. The alleged bankrupts without objection surrendered possession of the books to the receiver, who now holds them. The District Attorney of New York County, contemplating criminal prosecution of the petitioner, has demanded possession of the books for presentation to a Grand Jury. The petitioner asserts that such surrender would violate his constitutional privileges under Articles 4 and 5 of the U. S. Constitution.

NASH ROCKWOOD, for the rule.

JOAB H. BANTON, District Attorney, opposed.

LEARNED HAND, D. J.

It may be accepted that Judge Holt's ruling in *re* Harris, 164 Fed. Rep. 293, had the approval of the Supreme Court in the appeal in that case, in re Harris, 221 U. S. 274. There the alleged bankrupt resisted the surrender of his books to the receiver and was eventually protected to the extent that though he must surrender, it was on condition that the books should not be used by the receiver in aid of any criminal prosecution against him. Thus a compromise was effected between the right of his creditors to administer his assets and his own right not to produce evidence against himself.

In Johnson *v.* U. S. 228 U. S. 457, the bankrupt had without reservation surrendered his books to a trustee and these were thereafter used against him in a criminal trial over his objection. The point involving his constitutional privilege went to the Supreme Court and was ruled against him. The theory of the case was that once possession and title passed without protest from the bankrupt his privilege ended.

"A party is privileged from producing the evidence, but not from its production" (p. 458). In the case at bar there is indeed no trustee, only a receiver, and a receiver has no title, but that I conceive makes no difference. The production depends as little upon compelling the incriminated person to produce evidence against himself, when the possessor has no title as when he has. The possessor alone can produce, not the owner, and the privilege protects only against such compulsion. See also in *re* Tracy, 177 Fed. Rep. 532, and in *re* Mandel, 224 Fed. Rep. 642. The test I take

is whether the surrender was resisted when the receiver demanded possession.

Cases like Boyd *v.* U. S., 116 U. S. 616, Weeks *v.* U. S. 232 U. S. 383, and Silverthorne Lumber Co. *v.* U. S. 251 U. S. 385, are not in point. In each the possessor of the evidence was forced to produce by illegal means, and this was held to taint, as it were, the evidence, so that not even information might be used, which was derived during the unlawful possession. Gouled *v.* U. S. 255 U. S. 298 extended the rule to evidence procured by fraud. None of them touches the competency of proof which has been surrendered without claim of privilege made at the time when the privilege could have been effectively asserted.

Nor is Arndstein *v.* McCarthy, 254 U. S. 71, nearer. That case decided that the declarations contained in schedules did not open the door to examination generally of the bankrupt's assets. It would apply only in case the alleged bankrupts here were examined upon the transactions contained in the books and papers. No one suggested that the schedules themselves were privileged in favor of the bankrupts. Had that been the ruling, as, for example, it was before the repeal of R. S. Sec. 860, Johnson *v.* United States, 163 Fed. Rep. 30, something might be said in the case at bar for the privilege, not under the Constitution, it is true, but under the statute. Nothing of the sort now stands in the way, certainly not Arndstein *v.* McCarthy, *supra.*

Rule discharged.

L. H.,
D. J.

February 27, 1922.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 874.

ELMORE D. DIER, HARRY J. LAWRENCE, JR., AND LAWRENCE STARR, &C., ET AL., APPELLANTS,

against

JOAB H. BANTON, DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, AND MANFRED W. EHRICH, TRUSTEE IN BANKRUPTCY.

MEMORANDUM FOR MANFRED W. EHRICH, TRUSTEE IN BANKRUPTCY, IN OPPOSITION TO MOTION OF APPELLANTS.

This appeal is brought here direct from the District Court of the United States for the Southern District of New York, being allowed by order of Hon. Learned Hand, district judge (fol. 25). It seeks to bring up for review the order denying the motion of Elmore D. Dier and others, the bankrupts, for an injunction restraining the receiver (now the trustee) in bankruptcy from delivering the books, records and documents

of the said bankrupts to the District Attorney of the County of New York to be used in a criminal proceeding pending against the said bankrupts upon the ground that their use would violate the constitutional privileges of the bankrupts under articles IV and V of the United States Constitution (fols. 17-18). The order also directed that said books be delivered to the District Attorney for use in said criminal proceeding if and when appropriate process for that purpose was served (fol. 18).

The assignment of errors (fols. 19-20) presents no question except with respect to the alleged constitutional privilege of the bankrupts not to have such books, records, and documents used against them in any criminal proceeding.

The order is manifestly not appealable to this Court under the statutes governing such appeals for the following reasons:

1. No appeal lies in a bankruptcy matter direct from the District Court to this Court. Under the act of 1915 as amended, final appellate jurisdiction in all bankruptcy matters is vested in the Circuit Court of Appeals unless brought here by certiorari by this Court.

2. The bankrupts' privilege ended upon the possession of the books, records and documents being delivered by them to the receiver in bankruptcy (now the trustee), and therefore no constitutional question is involved herein, which alone would be reviewable by this Court in any event.

The lack of jurisdiction being here called to the attention of the Court, the appeal should be dismissed. Certainly no further stay should be granted, pending the hearing of the appeal in this Court.

Point I.

The order is not appealable to this court under the statutes governing appeals in bankruptcy matters.

The Act of January 28, 1915 (Chapter 22, Section 4) as amended by the Act of September 6, 1916 (Chapter 448, Section 3) provides that:

> "Judgments or decrees of the circuit court of appeals in all proceedings arising under 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July 1st, eighteen hundred and ninety-eight, and in all controversies arising in such proceedings and causes; * * *; and, also in all causes arising under any amendment or supplement to any one of the aforementioned acts which has been heretofore or may be hereafter enacted, shall be final, save only that it shall be competent for the supreme court to require by certiorari, upon petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination, with the same power and authority and with like effect as if taken to that court by appeal or writ of error."

This is a comprehensive provision which limits appellate jurisdiction of all bankruptcy matters to the circuit courts of appeal except where this court requires the matter to be certified to it by certiorari.

All the provisions theretofore in force of the Bankruptcy Act and of the Judicial Code relative to appeals to this court are superseded by this provision.

The appellant presumably relies upon section 239 of the Judicial Code (Act of March 3, 1911), as authorizing this appeal, contending that it involves the application of the Constitution of the United States. As to bankruptcy proceedings and all controversies therein, the above quoted Act of 1915 supersedes section 239 of the Judicial Code.

The Act of 1915 is sweeping in its provisions and makes all judgments and decrees of the Circuit Court of Appeals in all proceedings and causes arising under the Bankruptcy Act final not only in bankruptcy proceedings proper, but in all collateral controversies arising in the course of the proceedings as well. (Brandenburg on Bankruptcy, Fourth Edition, page 1244.)

Point II.

The order is not appealable because no constitutional question is involved herein. The ruling of the learned district court that the constitutional privilege ended upon the surrender by the bankrupts of their books to the receiver is manifestly correct.

The opinion of the learned district judge (fols. 12-13) refers to the decision of this court in *Johnson vs. U. S.*, 228 U. S., 457, in which it was directly held that where the bankrupt had without reservation surrendered his books to a trustee, his constitutional privilege was ended thereby, the court stating:

> "A party is privileged from producing the evidence, but not from its production."

That case is, of course, conclusive unless a distinction arises from the fact that the books were delivered to the receiver in bankruptcy by the bankrupts without reservation, and not to a trustee, as in the Johnson case. The court below held that this fact created no distinction, that the test was whether the surrender was resisted when the receiver demanded possession and that there was no such resistance. No claim was made by the appellants that they in any manner reserved their rights or made any resistance upon surrendering the books to the receiver. The privilege does not depend in any respect upon the title of the person to whom the bankrupts surrendered the books. Even had they surrendered them to some third party having nothing to do with the bankruptcy proceeding, they would lose their privilege; for as the court below remarked:

> "The possessor alone can produce, not the owner, and the privilege protects only against such compulsion."

The cases of *Boyd vs. U. S.*, 116 U. S., 616; *Weeks vs. U. S.*, 232 U. S., 383, and *Silverthorne Lumber Co. vs. U. S.*, 251 U. S., 385, are clearly distinguished in the opinion below (fol. 13) upon the ground that in each of those cases the possessor of the evidence was forced to produce it by illegal means.

In *Gouled vs. U. S.*, 255 U. S., 298, possession of the evidence was procured by fraud.

Arndstein vs. McCarthy, 254 U. S., 71, had nothing whatever to do with the production of books, records and documents, but related to an attempt to compel the bankrupt to testify orally to matters which might tend to incriminate him.

It thus appears that no question of constitutional privilege is involved herein and that therefore the order is not appealable.

The motion for a stay should be denied and the appeal dismissed.

Respectfully submitted,

SAUL S. MYERS,
ARTHUR GARFIELD HAYS,
Of Counsel for the Trustee in Bankruptcy.

Dated New York, May 22, 1922.

Printed in the United States by The Evening Post Job Printing Office, Inc.,
154 Fulton St., New York, N. Y.

FILED
MAY 18 1922
WM. R. STANSBURY
CLERK

Supreme Court of the United States.

IN THE MATTER
OF
ELMORE D. DIER, HARRY J. LAWRENCE, JR., LAWRENCE STARR, individually and as co-partners doing business under the firm name of E. D. DIER & Co., and E. D. DIER & Co.,
Alleged Bankrupts,
Appellants.

October Term, 1921.
No. [redacted]320

MEMORANDUM FOR APPELLANTS ON MOTION TO ADVANCE CAUSE AND FOR STAY PENDING DECISION.

Statement of Procedure.

On January 14th, 1922, a petition in involuntary bankruptcy was filed against E. D. Dier & Co., a co-partnership, appellants here.

On January 16th, 1922, the United States District Court for the Southern District of New York appointed a Receiver in Bankruptcy and directed him to take possession of all books, records, documents,

&c. of E. D. Dier & Co., and such books, records and documents were ordered to be turned over to the Receiver. (See Order Appointing Receiver, fols. 1-4.)

Acting under such order of appointment, the Receiver took physical possession of the books, records and papers of the alleged bankrupts.

While the Receiver had possession of such books and records, and before the appointment of a Trustee in Bankruptcy, the District Attorney of the County of New York issued a subpœna to the Receiver, in substance, directing him to turn over the books and records to the District Attorney for use in a criminal proceeding against the alleged bankrupts. The alleged bankrupts immediately, on February 16th, 1922, presented a petition to the District Court of the United States for the Southern District of New York, praying for an order to show cause why the Receiver should not be enjoined and restrained from delivering over the books and records to the District Attorney upon the ground that such delivery would be violative of the Constitutional privileges of the petitioners, in accordance with Amendments 4 and 5 to the United States Constitution, in that it would, in effect, be compelling the alleged bankrupts to be witnesses against themselves. (See Petition, fols. 6-11.)

The order to show cause was granted and directed to Hon. Joab H. Banton, District Attorney of New York County, and Manfred W. Ehrich, as Receiver of the alleged bankrupts, and was returnable on February 20th, 1922. The Court also granted a stay and directed the Receiver to retain possession of the books, records, documents and papers of the alleged bankrupts until the further order of the Court. (See Order to Show Cause,

fols. 4-6.) After argument, with decision reserved, Hon. Learned Hand, District Judge for the Southern District of New York, made an order discharging the rule, the order containing the following clause:

> "FURTHER ORDERED that the Receiver herein and said alleged bankrupts deliver over said books, records and documents of said E. D. Dier and E. D. Dier & Company to the District Attorney of the County of New York, for use in said criminal proceedings against said Petitioners, if and when appropriate process for that purpose is duly served." (See Order, fols. 17-19.)

The Court filed an opinion which is printed in the record. (See Opinion, fols. 11-14.)

E. D. Dier & Co. thereupon applied for leave to appeal to this Court upon assignment of errors. (See Petition, fols. 22-25; see Assignment of Errors, fols. 19-22.)

The appeal was allowed on April 10th, 1922. (See Order, fols. 25-26.)

The record was certified and filed in this Court on April 13th, 1922.

The Court, by order, continued the stay up to and including May 16th, 1922.

Appellants' motion to advance the cause for argument and for the continuance of the stay *pendente* was presented to this Court on May 15th, 1922.

ARGUMENT.

I.

The possession of the books, records and documents of the alleged bankrupts by the Receiver was, in legal effect, the possession of the bankrupts.

In the preface to the opinion by Judge Hand, it is stated:

> "The alleged bankrupts without objection surrendered possession of the books to the Receiver, who now holds them."

It will be noted that the Petition in Bankruptcy was an involuntary proceeding instituted by creditors and that when the Receiver, upon appointment, took possession of the books, records and documents of the alleged bankrupts, he did so under the specific order of the Court. The Bankrupts did not surrender possession. The Receiver *took* possession, as the Court had instructed him to do. This was not such a delivery of the books by the Bankrupts as constituted a waiver of their Constitutional rights. If they had interfered with the Receiver in obtaining the possession of the books, it would have constituted a contempt of court. After the Court had made its order directing the Receiver to take possession of the books, the Bankrupts had no alternative but to permit the Receiver to take such possession in order to facilitate the administration in bankruptcy.

See *In re Harris*, 164 Fed. Rep. 292, (affirmed in

this Court, In *Matter of Harris*, 221 U. S. 274), wherein the syllabus, in part, reads:

> "A bankrupt is not deprived of his constitutional right not to testify against himself by an order requiring him to surrender his books to the duly authorized Receiver."

The particular attention of the Court is called to the fact that in the Harris case the original order directing the delivery of the books to the Receiver definitely protected the Bankrupts against the use of the books in criminal prosecutions and gave an opportunity for the Constitutional privilege to be asserted. In the case at bar, the order directing the delivery of the books to the Receiver contains no protective clause whatever so that when the District Attorney sought to reach the books by subpœna in the hands of the Receiver, the Bankrupts asserted their Constitutional rights at the most effective moment.

The Receiver, under the order of the Court, did not take title to the property of the alleged bankrupts or to the books. He was merely a custodian and his possession was, in legal effect, the possession of the bankrupts. When, therefore, the subpœna directed the Receiver to turn over the books to the District Attorney, it, in legal effect, directed the Bankrupts to so turn over their books, records and documents, which was violative of their Constitutional rights.

II.

The bankrupts' objection to the use of the books in a criminal proceeding was made in due time.

Immediately upon the demand by the District Attorney upon the Receiver for the delivery of the books and the service of the subpœna upon the Receiver, the alleged Bankrupts instituted this proceeding by petition to restrain the delivery of such documents and for the assertion of their Constitutional rights. This was the earliest moment at which the claim of privilege could have been effectively asserted. The Bankrupts could not have interfered with the Receiver's taking possession of the books without subjecting themselves to punishment for contempt of Court. Judge Hand, in his opinion, states:

> "The test, I take it, is whether the surrender was resisted when the Receiver demanded possession."

In the case at Bar, there was no surrender of the books, &c. The Receiver simply took possession under the order appointing him. If we are right in our contention that the Receiver took no title and was the mere legal custodian of the property, then there could have been no waiver of Constitutional rights under the circumstances of this case. The alleged Bankrupts interposed their objection by application to the Court prior to the appointment of a trustee in bankruptcy and before title to any of their property had passed. Let us assume that the petition in bankruptcy had been dismissed, then the Receivership would have fallen with it and the Bankrupts would again have been entitled to possession of their books. Could it be held that be-

cause the books had temporarily passed into the legal possession of the Receiver, that their Constitutional rights with reference to criminal proceedings had been waived?

In *Johnson* v. *U. S.*, 228 U. S. 457, cited by Judge Hand, a very different state of facts was presented. There a Trustee in Bankruptcy had been appointed and the Bankrupt surrendered his books to the Trustee without reservation. This Court held, in substance, that when possession and *title* passed without protest from the bankrupt his privilege ended. In the case at bar, the Court will note that title had not passed before the assertion of the privilege, as the books were only held in the legal possession of the Receiver as Custodian.

See also:

Amos v. *U. S.*, 255 U. S. 313;
Flagg v. *U. S.*, 233 Fed. 481;
Arnstein v. *McCarthy*, 254 U. S. 71.

III.

The stay should be continued pending the decision of this Court.

The question of law presented by this appeal has apparently not been directly decided by this Court in any reported decision. If the stay is not continued pending argument of the appeal and decision, the books will be delivered to the District Attorney for use in a contemplated criminal investigation, and there could be no subsequent relief to the Appellants. On the other hand, no harm can come from continuing the stay until the question is decided, as there is no question of the Statute of Limitations being involved relative to the commis-

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Supreme Court of the United States.

OCTOBER TERM—1921.

No. 330.

IN THE MATTER

of

ELMORE D. DIER, HARRY J. LAWRENCE, JR. and LAWRENCE STARR, individually and as co-partners doing business under the firm name of E. D. Dier & Co. and E. D. DIER & Co., Bankrupts,

Appellants,

JOAB H. BANTON, District Attorney of New York County, and MANFRED W. EHRICH, Trustee in Bankruptcy of E. D. Dier & Co.,

Appellees.

BRIEF FOR APPELLEE, MANFRED W. EHRICH, TRUSTEE IN BANKRUPTCY.

Statement of the Case.

Appellee Ehrich, the Trustee in Bankruptcy, joins in the brief submitted by Appellee Banton, the District Attorney of New York County, and

in the Statement in that brief contained (pp. 1-4). Appellee Ehrich takes this occasion to supplement that Statement by the specific correction of an erroneous declaration in the brief of the appellants. Proposing no reference to any page of the record, appellants say (Appellants' brief, page 4): "The Receiver *took* possession without notice of any kind. There was at no time a voluntary surrender by E. D. Dier & Company to the Receiver and the Receiver's possession of the books was at all times an enforced possession." (Italics appellants'). No such contention is made or suggested in the very petition (Record pages 3-4) from whose denial the appeal is taken (Record, pages 13-14). The statement quoted is then an unsupported statement. We deem it not improper to add (appellants having thus travelled outside the record in order to raise this issue) that that statement is furthermore a mistaken statement and that this circumstance the records of this court indicate. From an affidavit on file in this court it appears: "The bankrupts voluntarily handed over to the Receiver in Bankruptcy the books and papers now sought by subpoena. Some of these records were handed over to me personally as the Receivers' representative; other papers were to my own knowledge handed over to the Receiver personally by the bankrupts and their present attorney Nash Rockwood, Esq. At the time of turning over of such books and papers *no protest of any kind* was made by the bankrupts or their attorneys." (Affidavit of Saul S. Myers in opposition to a stay sworn to May 13, 1922; [italics in original] the stay was denied by order of this court May 29, 1922).

The case was heard below on a rule *nisi*. No answer was filed. The court below recited that the

"alleged bankrupts without objection surrendered possession of the books to the Receiver, who now holds them" (Record, p. 5).

The petition below is to enjoin and restrain the Receiver from turning the books over to the District Attorney of New York County (Record, pp. 3-5). The petition was denied and the delivery to the District Attorney "for use in said criminal proceeding against said Petitioners" ordered (Record, p. 9). The receivership terminated with the petitioners' adjudication as bankrupts (Record, p. 8) and has been succeeded by a trusteeship (Record, p. 8). The records of this court show that a stay pending the appeal was denied (order of this court May 29, 1922). In the circumstances —the instant application being directed not to getting the papers back from the New York officials (compare as to the procedure *Wise* v. *Mills*, 220 U. S. 549; *Weeks* v. *U. S.*, 232 U. S. 383, 398) but to restraining those officials from taking them —it is submitted that the issue is moot. (Compare *U. S.* v. *Evans*, 213 U. S. 297; *Lewis Publishing Co.* v. *Wyman*, 228 U. S. 610).

Questions Involved.

The questions raised by the present appeal—assuming, indeed, for the purposes of argument that any actual controversy remains—are two:

I. Whether a bankrupt who has turned over his books, records and documents to a Receiver in involuntary bankruptcy proceedings without making any claim of right to be protected against their subsequent use in a criminal prosecution, can restrain such use by prosecuting officers, either state or federal.

II. Whether a bankrupt may invoke any privilege under the Fourth or Fifth Amendments to the Constitution of the United States against prosecution by state authorities.

Upon the former of these questions we shall offer in the brief which follows rather casual additions merely to the argument in the District Attorney's brief; to the latter we shall devote a short, independent discussion.

POINT I.

A bankrupt whose books, papers and documents have passed out of his possession without his protest and without express reservation of any constitutional right, may not invoke a privilege either under the Fourth or under the Fifth Amendment.

1. It has never been decided that a bankrupt even if he invokes his alleged right at the time of turning over the documents, has any constitutional privilege against their subsequent use in any prosecution. In *Matter of Harris,* (221 U. S. 274, 280) this Court did indeed refer, with apparent approval, to "the properly careful provision to protect him [the bankrupt] from use of the books in aid of prosecution." This "provision" was made at the commencement of the receivership. In *Johnson* v. *United States,* (228 U. S. 458) this Court, however,—while emphatically deciding that the bankrupt had no greater right than had been given him in the *Harris* case—specifically noted a doubt "if there were any" constitutional rights involved.

2. Appellant's case is necessarily and explicitly premised upon the proposition that there is a legal difference between the use of the books after they have passed into the Trustee's possession (as in the *Johnson* case) and their use after they have passed into the Receiver's possession. The answer to that contention is to be found in the *Johnson* case itself. For that case, as we have just noted, was decided after the *Harris* case. And the *Harris* case was a case where, as in this case (at the time of the petition), there had been a re-

ceivership only, not a trusteeship. The Court in the *Johnson* case took no distinction based upon the nature of the custody into which the bankrupt's books had passed. Its *sole* distinction was a distinction resting upon the fact that in the *Harris* case the bankrupt asserted and tried to preserve his alleged right at the time the documents passed out of his control. The *Harris* case, this Court declared in the *Johnson* opinion, "marked the *limit of the law in a case where no rights, if there were any, were saved when the books were transferred.*" In the *Johnson* case, then, this Court passed over as unworthy even of discussion the distinction upon which the present appeal is based; and at the same time drew a distinction which is fatal to the appellant's whole argument.

3. The only conceivable distinction between the use of the documents after they have passed into the Receiver's hands and their use after they have passed into the Trustee's hands is a distinction which this Court has in principle rejected again and again. It is a distinction which appellants themselves thus formulate (appellant's brief, p. 6) "a Trustee under the Bankruptcy Act has title, whereas a Receiver is only an arm of the court to hold possession without title." But it is precisely possession—and not title—that in these cases is all-important. Thus it has been squarely decided by this Court that there is no privilege against the use by the District Attorney of documents deposited in court as exhibits in a civil litigation (*Pearlman* v. *United States*, 247 U. S. 7); such exhibits, precisely like the documents in the case at bar, are in the custody of the law and out of the possession of the owner. So there is no

privilege against the use of bankruptcy schedules in a criminal prosecution in the state (Ensign *v.* Pa., 227 U. S. 592; see *infra*, p. 10)—or even, it seems, in the federal (*Schoenfeld* v. *United States*, 277 Fed. 934; certiorari denied, 258 U. S. 623)—courts. There is no privilege, again, against the use of letters written by a prisoner and read by the warden of the penitentiary (*Stroud* v. *United States*, 251 U. S. 15, 21). And precisely as one who surrenders possession loses his privilege even though he keeps title, so one cannot acquire a privilege (to which he has no other claim) by acquiring title (compare *Wheeler* v. *United States*, 226 U. S. 478, 490, and note the citation of this case in *Johnson* v. *U. S.*, *supra*.).

POINT II.

A bankrupt may not invoke any privilege under the Fourth or Fifth Amendments to the Constitution of the United States against prosecution by state authorities.

It is a *State* officer—"the District Attorney of the County of New York" (p. 4)—whose activities appellants seek to thwart. It is a fear of the use of the documents in proceedings under the jurisdiction of the *State*—proceedings "before the Grand Jury of the County of New York" (p. 4)—that appellants admit. And yet it is a right under "the Fourth and Fifth Amendments to the Constitution of the *United States*" that appellants assert (p. 4).

The two amendments, upon elementary principles, give no protection against state action whatever, (*Barron* v. *Baltimore*, 7 Pet. 243; *Twining* v. *New Jersey*, 211 U. S. 78, 93; *Ensign* v. *Pa.*, 227 U. S. 592, 597).

The decisions have indeed done much more than settle the principle that no Federal question under the Fourth or Fifth Amendments is involved in the compulsory production of documents or the compulsory giving of testimony in the state courts. They have settled, as well, the principle that a witness may not refuse to give testimony in the Federal courts because it might subject him to a State prosecution (*Hale* v. *Henkel*, 201 U. S. 43, 69; see also *Brown* v. *Walker*, 161 U. S. 591 at p. 608). So, too, there is no right to withhold testimony in a State court because of the fear of a Federal prosecution (*Jack* v. *Kansas*, 199 U. S.

372, 382). "The only danger to be considered is one arising in the same jurisdiction and under the same sovereignty" (*Hale* v. *Henkel, supra.*). Upon like grounds—for the "relation between the two amendments" (the Fourth and Fifth) is "intimate" (*Boyd* v. *United States,* 116 U. S. 616, 633; see also p. 630; and see *Bram* v. *U. S.* 168, U. S. 532, 544)—the production of documents may not be refused in the courts of one jurisdiction because of a fear of consequences in the other.

How elementary are these principles a phrase in Mr. Justice Pitney's opinion in *Ensign* v. *Pa.* (*supra*) well illustrates. Mr. Justice Pitney there held as matter of course that the admission in a state prosecution of schedules in bankruptcy involved no Federal *constitutional* question. The "one" question that was even "debatable" (227 U. S. at p. 598) was a question (not here presented) arising under a *statute.*

We may state the effect of the foregoing principles concretely. The bankrupt would have had no right under the Fourth or Fifth Amendments to have refused himself to testify in the state courts, or to have withheld his books from the state court even if he had *kept* possession of them. Certainly he gained no new rights because he *lost* possession.

The only rights which the bankrupt even claims are, as we have seen, rights under the Fourth and Fifth Amendments. It may, however, be worth noting that had he relied upon the Fourteenth Amendment the result would have been the same. It has been precisely decided that the avoidance of self-incrimination in a state court prosecution is neither an incident of liberty as defined by the

due process provision nor a privilege or immunity of federal citizenship (*Twining* v. *New Jersey*, 211 U. S. 78, 93-114). Such, and even more plainly, must be the law with respect to searches and seizures.

Respectfully submitted,

SAUL S. MYERS,
WALTER H. POLLAK
WILLIAM J. HUGHES
Counsel for Appellee
Ehrich, Trustee.

Supreme Court of the United States

In the Matter of ELMORE D. DIER, HARRY J. LAWRENCE, JR., LAWRENCE STARR, individually and as co-partners doing business under the firm name of E. D. DIER & Co., and E. D. DIER & Co., Bankrupts, Appellants.	October Term, 1921. No. 874.

BRIEF FOR APPELLANTS

Statement of Procedure

On January 14th, 1922, a petition in involuntary bankruptcy was filed against E. D. Dier & Co., a copartnership, appellants here.

On January 16th, 1922, the United States District Court for the Southern District of New York appointed a Receiver in Bankruptcy, without notice to the bankrupts, and directed him to take possession of all books, records, documents, etc., of E. D. Dier & Co., and such books, records and documents were ordered to be turned over to the Receiver. The order specifically directed and commanded the Bankrupts to turn over to the Receiver all of their property, including "Ac-

count books" and "Records." (See order appointing Receiver, fols. 1-4.)

Acting under such order of appointment, and without any notice to the Bankrupts, the Receiver took physical possession of all of their books, records and papers.

While the Receiver under the order of the Court had possession of such books, records and papers, and before the appointment of a Trustee in Bankruptcy, the District Attorney of the County of New York issued a subpoena to the Receiver, in substance, directing him to turn over the books and records to the District Attorney for use in a criminal prosecution against the bankrupts. The bankrupts immediately, on February 16th, 1922, presented a petition to the District Court of the United States for the Southern District of New York, praying for an order to show cause why the Receiver should not be enjoined and restrained from delivering over the books and records to the District Attorney upon the ground that such delivery would be violative of the Constitutional privileges of the petitioners, in accordance with Amendments 4 and 5 to the United States Constitution, in that it would, in effect, be compelling the bankrupts to be witnesses against themselves. (See Petition, fols. 6-11.)

The order to show cause was granted and directed to Hon. Joab H. Banton, District Attorney of New York County, and Manfred W. Ehrich, as Receiver of the alleged bankrupts, and was returnable on February 20th, 1922. The Court also granted a stay and directed the Receiver to retain possession of the books, records, documents and papers of the alleged bankrupts until the further order of the Court. (See Order to Show Cause, fols. 4-6.) After argument, with decision reserved, Hon. Learned

Hand, District Judge for the Southern District of New York, made an order discharging the rule, the order containing the following clause:

> "FURTHER ORDERED that the Receiver herein and said alleged bankrupts deliver over said books, records and documents of said E. D. Dier and E. D. Dier & Company to the District Attorney of the County of New York, for use in said criminal proceedings against said Petitioners, if and when appropriate process for that purpose is duly served." (See Order, fols. 17-19.)

The Court filed an opinion which is printed in the record. (See Opinion, fols. 11-14.)

E. D. Dier & Co. thereupon applied for leave to appeal to this Court upon assignment of errors. (See Petition, fols. 22-25; see Assignment of Errors, fols. 19-22.)

The appeal was allowed on April 10th, 1922. (See order, fols. 25-26.)

The record was certified and filed in this Court on April 13th, 1922.

There has been no change of parties or attorneys pending appeal.

Argument

I

The possession of the books, records and documents of the alleged bankrupts by the receiver was a possession enforced by the Court and was, in legal effect, the possession of the bankrupts.

In the preface to the opinion by Judge Hand, it is stated:

> "The alleged bankrupts without objection surrendered possession of the books to the Receiver, who now holds them."

There is no evidence to this effect in the record. The Court appointed a receiver *ex parte* and commanded that he take possession of the books, records and documents of the then alleged bankrupts and the Receiver *took* possession without notice of any kind. There was at no time a voluntary surrender by E. D. Dier & Company to the Receiver and the Receiver's possession of the books was at all times an enforced possession.

It will be noted that the Petition in Bankruptcy was an involuntary proceeding instituted by creditors and that when the Receiver, upon appointment, took possession of the books, records and documents of the alleged bankrupts, he did so wholly under the specific order of the Court. This was not such a delivery of the books by the Bankrupts as constituted a waiver of their Constitutional rights. If they had interfered with the Receiver in obtaining possession of the books it would have been a contempt of Court. The order of the Court which was wholly *ex parte* did not in any way protect or seek to protect the Constitutional privileges of the alleged bankrupts. In this respect the order differed materially from

the order of the District Court in *Matter of Harris*, 221 U. S., 224, wherein the Court, while permitting the use of the books by the Receiver, expressly provided that they should not be used for any criminal proceedings. Justice Holmes writing the opinion of this Court in the *Harris* case *(supra)* said:

> "As the bankruptcy Court could have enforced little in favor of the Trustee, it could enforce possession *ad interim* in favor of the Receiver. In the properly careful provision to protect him from use of the books in aid of prosecution the bankrupt got all that he could ask."

In the case at bar the Bankrupts were not in any way protected by the order appointing the Receiver.

The syllabus in the *Harris* case *(supra)*, reads in part:

> "A bankrupt is not deprived of his constitutional right not to testify against himself by an order requiring him to surrender his books to the duly authorized Receiver."

As the order directing the delivery of the books to the Receiver contained no protective clause whatever, the Bankrupts asserted their Constitutional rights at the first effective moment, when the District Attorney sought to reach them by subpoena for use in a criminal proceeding.

The Receiver, under the order of the Court, did not take title to the property of the alleged bankrupts or to the books. He was merely a custodian and his possession was, in legal effect, the possession of the bankrupts. When, therefore, the subpoena directed the Receiver to turn over the books to the District Attorney, it, in legal effect, directed the ***Bankrupts*** to so turn over their

books, records, and documents, which was violative of their Constitutional rights.

Could it be maintained that the District Attorney could have procured by subpoena the books of E. D. Dier & Co. for use in a criminal prosecution against them? If then, the Receiver was only a custodian without title, has the *ex parte* order of the Court appointing the Receiver operated to deprive E. D. Dier & Co. of their Constitutional privileges? Is the subpoena served upon the Receiver—the legal Custodian—of any greater force than if served upon E. D. Dier & Co.?

Judge Hand in his opinion states that "it makes no difference" whether the books were in the possession of the Receiver or a Trustee in Bankruptcy. The obvious difference is that a Trustee under the Bankruptcy Act has title, whereas a Receiver is only an arm of the Court to hold possession without title and his possession is the possession of the bankrupts.

In re Hess, 134 Fed. R., 109.

Judge Hand also proceeded upon the theory that the bankrupts "surrendered possession" of their books, which was an erroneous construction of the order appointing the Receiver.

See:

Counselman v. Hitchcock, 142 U. S., 547;
Brown v. Walker, 161 U. S., 591;
Ensign v. Commonwealth of Penn., 227 U. S., 592.

II

The bankrupts' objection to the use of the books in the criminal prosecution by the District Attorney of New York County was made in due time.

Immediately upon the demand by the District Attorney upon the Receiver for the delivery of the books and the service of the subpoena upon the Receiver, the Bankrupts instituted this proceeding by petition to restrain the delivery of such documents and for the assertion of their Constitutional rights. This was the earliest moment at which the claim of privilege could have been effectively asserted. The Bankrupts could not have interfered with the Receiver's taking possession of the books without subjecting themselves to punishment for contempt of Court. Judge Hand, in his opinion, states:

> "The test, I take it, is whether the surrender was resisted when the Receiver demanded possession."

In the case at Bar, there was no surrender of the books, etc. The Receiver simply *took* possession under the order appointing him. If we are right in our contention that the Receiver took no title and was the mere legal custodian of the property, then there could have been no waiver of Constitutional rights under the circumstances of this case. The alleged Bankrupts interposed their objection by application to the Court prior to the appointment of a trustee in bankruptcy and before title to any of their property had passed. Let us assume that the petition in bankruptcy had been dismissed, then the Bankrupts would again have been entitled to possession of their books. Could it be held that because the books had tem-

porarily passed into the legal possession of the Receiver, that their Constitutional rights with reference to criminal proceedings had been waived?

In *Johnson v. U. S.*, 228 U. S., 457, cited by Judge Hand, a very different state of facts was presented. There a *Trustee* in Bankruptcy had been appointed and the Bankrupt surrendered his books to the Trustee without reservation. This Court held, in substance, that when possession and *title* passed without protest from the bankrupt his privilege ended. In the case at bar, the Court will note that title had not passed before the assertion of the privilege, as the books were only held in the legal possession of the Receiver as Custodian.

See also:

Boyd v. U. S., 116 U. S., 616;
Werks v. U. S., 232 U. S., 383;
Flagg v. U. S., 233 Fed., 481;
Silverthorne Lumber Co. v. U. S., 251 U. S., 385;
Amos v. U. S., 255 U. S., 313.

III

The order is appealable to this Court.

Section 239 of the Judicial Code (Act of March 3, 1911) authorizes an appeal to this Court as the order appealed from and the subject matter of the appeal, involve the application of the Constitution of the United States.

This is not a proceeding in bankruptcy nor one collateral thereto within the purview of the Act of January 28, 1915 (Ch. 22, Sec. 4) as amended by the Act of September 6, 1916 (Ch. 448, Sec. 3). It is a proceeding by petition to prevent the violation of a Constitutional privilege and is wholly distinct from the bankuptcy. It seeks only to restrain the District Attorney of New York County from using the books of citizens in a criminal prosecution against themselves, and does not affect or relate to the bankruptcy proceeding in any way whatsoever.

IV

The order should be reversed; the original stay continued, and the District Attorney restrained from the use of the books and records in any criminal prosecution against the appellants.

New York, February 22, 1923.

NASH ROCKWOOD,
of Counsel for Appellants.

DIER ET AL., INDIVIDUALLY AND AS COPARTNERS UNDER THE FIRM NAME OF E. D. DIER & COMPANY, ET AL., *v.* BANTON, DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 330. Argued April 17, 1923.—Decided May 7, 1923.

1. One who has been adjudged an involuntary bankrupt and has complied with an order requiring him to turn over his books and papers to a receiver is not privileged by the Fourth and Fifth Amendments to prevent their production by the receiver before a grand jury in a state court upon the ground that he might thus be incriminated. P. 149.
2. Books and papers in the possession of a receiver in bankruptcy appointed by a federal court cannot be taken by a subpœna issuing from a state court, unless the federal court, exercising its discretion with due regard for comity, shall consent. P. 151.

279 Fed. 274, affirmed.

APPEAL from an order of the District Court discharging a rule *nisi* and refusing to enjoin the production of books and papers, in the custody of its receiver in bankruptcy, before a grand jury in a state court.

Mr. Nash Rockwood for appellants.

It will be noted that the petition in bankruptcy was an involuntary proceeding instituted by creditors, and that when the receiver, upon appointment, took possession of the books, records and documents of the alleged bankrupts, he did so wholly under the specific order of the court. This was not such a delivery of the books by the bankrupts as constituted a waiver of their constitutional rights. If they had interfered with the receiver in obtaining possession of the books, it would have been a contempt of court. The order of the court, which was wholly *ex parte*, did not in any way protect or seek to

protect the constitutional privileges of the alleged bankrupts. In this respect the order differed materially from the order of the District Court in *Matter of Harris*, 221 U. S. 274.

A trustee under the Bankruptcy Act has title, whereas a receiver is only an arm of the court, to hold possession without title, and his possession is the possession of the bankrupts. *In re Hess*, 134 Fed. 109. See *Counselman* v. *Hitchcock*, 142 U. S. 547; *Brown* v. *Walker*, 161 U. S. 591; *Ensign* v. *Pennsylvania*, 227 U. S. 592.

The bankrupts' objection to the use of the books in the criminal prosecution by the District Attorney of New York County was made in due time.

Let us assume that the petition in bankruptcy had been dismissed, then the bankrupts would again have been entitled to possession of their books. Could it be held that, because the books had temporarily passed into the legal possession of the receiver, their constitutional rights with reference to criminal proceedings had been waived? *Johnson* v. *United States*, 228 U. S. 457; *Boyd* v. *United States*, 116 U. S. 616; *Weeks* v. *United States*, 232 U. S. 383; *Flagg* v. *United States*, 233 Fed. 481; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *Amos* v. *United States*, 255 U. S. 313.

The order is appealable to this Court.

Mr. Joab H. Banton and *Mr. John Caldwell Myers* appeared for Banton, District Attorney, appellee.

Mr. Saul S. Myers, *Mr. Walter H. Pollak* and *Mr. William J. Hughes* appeared for Ehrich, Trustee in Bankruptcy, appellee.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This appeal is from an order of the District Court for the Southern District of New York discharging a rule *nisi* and

refusing an injunction. On January 14, 1922, a petition in involuntary bankruptcy was filed against Elmore D. Dier and others, partners, as E. D. Dier & Company. Two days after the filing of the petition, Manfred W. Ehrich was appointed Receiver of the estate of the alleged bankrupts, and they and their servants were directed to turn over all their property, assets, account books and records and were restrained from suing out of any other court any process to impound or take possession of them. This order was complied with and the Receiver took possession of the books and papers of the alleged bankrupts and of the firm. On February 16th, Dier informed the court that the District Attorney of New York County had applied to the Receiver for the production of these books and papers before the Grand Jury, and asked for the rule *nisi* against the Receiver and the District Attorney, and upon a hearing thereof an injunction to prevent the use of such books and papers against him before the Grand Jury, on the ground that they would incriminate him and that his right to refuse to testify against himself under the Fourth and Fifth Amendments would thus be violated by the process of the Federal District Court. Judge Learned Hand, sitting in bankruptcy, discharged the rule and refused to enjoin the proposed use of the books. Judge Hand's action was based on the ruling of this Court in *Johnson* v. *United States,* 228 U. S. 457. He quoted the language used in the *Johnson Case,* "A party is privileged from producing the evidence but not from its production." He alluded to the circumstance that in the *Johnson Case* there were both title and possession in the Trustee, whereas in this case, the books and papers were in the hands of the Receiver who has no title but that, he said, made no difference. We agree with this view and hold that the right of the alleged bankrupt to protest against the use of his books and papers relating to his business as evidence against him ceases as soon as his pos-

session and control over them pass from him by the order directing their delivery into the hands of the Receiver and into the custody of the court. This change of possession and control is for the purpose of properly carrying on the investigation into the affairs of the alleged bankrupt and the preservation of his assets pending such investigation, the adjudication of bankruptcy *vel non*, and if bankruptcy is adjudged, the proper distribution of the estate. It may be that the allegation of bankruptcy will not be sustained, and in that case, the alleged bankrupt will be entitled to a return of his property including his books and papers; and when they are returned, he may refuse to produce them and stand on his constitutional rights. But while they are, in the due course of the bankruptcy proceedings, taken out of his possession and control, his immunity from producing them, secured him under the Fourth and Fifth Amendments, does not enure to his protection. He has lost any right to object to their use as evidence because, not for purpose of evidence, but in the due investigation of his alleged bankruptcy and the preservation of his estate pending such investigation, the control and possession of his books and papers relating to his business were lawfully taken from him.

It is pressed upon us that the bankrupt may prevent the use of such books and papers taken over by a receiver in the bankruptcy proceedings for evidence in a criminal case in the state court by resisting surrender and protesting against their use for such a purpose at the time the Receiver took possession. But we think the alleged bankrupt has no such right. We so held in *Ex parte Fuller, ante,* 91, in which it was sought to attach conditions of this kind to the turning over of the books and papers of a bankrupt to the Trustee in Bankruptcy. We are of opinion that the same principle must apply to the delivery of the books and papers relating to the bankrupt's business and property included in the estate into the custody of the Receiver of the Bankruptcy Court.

Of course, where such books and papers are in the custody of the Bankruptcy Court, they can not be taken therefrom by subpœna of a state court except upon consent of the federal court. In granting or withholding that consent the latter exercises a judicial discretion dependent on the circumstances, and having due regard to the comity which should be observed toward state courts exercising jurisdiction within the same territory. *Ponzi* v. *Fessenden*, 258 U. S. 254, 259. All we hold here is that the court below having exercised discretion to allow the use of the books and papers in the custody of its officer upon subpœna by another court, the alleged bankrupt's rights under the Fourth and Fifth Amendments have not been violated.

Order affirmed.